①

Supreme Court, U.S.
FILED

01-56 JUL 09 2001

No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

IN RE BRIAN GARCIA,

Petitioner

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF HABEAS CORPUS

PETITION FOR A WRIT OF HABEAS CORPUS

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Garcia
One Kennedy Square, Suite 500
Detroit, MI 48226
(313) 965-4189

119 pp

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF HABEAS CORPUS

Pursuant to S.Ct. Rules 17 and 20, Petitioner moves this Court for leave to file a Petition for Writ of Habeas Corpus as an original action in the United States Supreme Court.

In *Hohn v. United States*, 524 US 236 (1998), the Supreme Court ruled that where a criminal defendant petitioner lost a Petition for Habeas Corpus, and the courts would not grant a Certificate of Appealability, the petitioner could nonetheless seek review by way of an original Petition for Habeas Corpus filed in the United States Supreme Court, under "extraordinary circumstances."

The extraordinary circumstances in this case are that when the Petitioner refused to plead guilty in an infant death case, the judge threatened him by stating, inter alia:

> "THE COURT: And if the jury buys the version of the defendant's - what it is - third or fourth statement - whichever particular one - about bashing the kid's head 20 or 30 times, they're not only likely to find him guilty, they're likely to be ready to storm out of the jury box and lynch him right here."

The judge also informed Petitioner that a member of the deceased's family would want to "come into the courtroom and summarily do - do away with the defendant on the spot." (T Apr 8, 18-19).

Leaving aside that the Petitioner never said what the judge attributed to him about striking the baby's head 20 to 30 times (Petitioner's statements to police are on tape and on the record), we have ample case law holding that a judge may not persuade a defendant to plead guilty with predictions that the defendant will lose at a trial. We have ample case law holding that a judge may not persuade a defendant to plead guilty by threatening him with mob violence.

The extraordinary circumstance is that Petitioner's statements show him to be innocent of murder, in that he did not intend harm to the infant. He said he wanted a trial, but the judge used terror to coerce Petitioner into a plea.

The completely unreasonable finding that there is no issue here worthy of discussion is itself an additional extraordinary circumstance.

This case should be accepted and a ruling issued on the merits to determine precisely under what circumstances threats and warnings issued by a judge to a defendant who refuses to plead guilty makes the subsequent guilty plea involuntary.

Two other issues are raised. This case should be accepted and a ruling issued on the merits to determine whether *Henderson v. Morgan*, 426 U.S. 637; 96 S.Ct. 2253; 49 L.Ed.2d 108 (1976) has any continuing vitality, or whether it is a dead letter as the United States District Court and Sixth Circuit Court of Appeals seem to think. Petitioner, who believed he had unintentionally caused the baby's death, was not told what is required to prove a charge of murder.

This case should be accepted and a ruling issued on the merits to determine the propriety of holding a defendant incommunicado and allowing him a phone call only after he gives in to police pressure to make a statement. Unfortunately, this is not so extraordinary, in that police do this fairly frequently, and, we submit, should be dissuaded from doing so.

Where, as here, the judge himself threatens mob violence if the defendant dares to exercise his constitutional right to a jury trial, we have an extraordinary circumstance that demands Supreme Court review. *Moore v. Dempsey*, 261 U.S. 96; 43 S.Ct. 265; 67 L Ed 543 (1923); *Chambers v. State of Florida*, 309 U.S. 227; 60 S.Ct. 472; 84 L Ed 716 (1940).

Respectfully submitted,

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Garcia
One Kennedy Square, Suite 500
Detroit, MI 48226
(313) 965-4189
Dated: July 3, 2001

No. ____________________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

IN RE BRIAN GARCIA,

Petitioner

PETITION FOR A WRIT OF HABEAS CORPUS

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Garcia
One Kennedy Square, Suite 500
Detroit, MI 48226
(313) 965-4189

QUESTIONS PRESENTED

Petitioner Brian Garcia entered a guilty plea to second degree murder in the death of an infant he was babysitting. He first insisted on a trial and refused to plead guilty, but an incident occurred that caused him to change his mind. The questions presented are:

QUESTION 1: WHETHER PETITIONER'S NO CONTEST PLEA TO MURDER WAS COERCED AND INVOLUNTARY WHERE, AFTER PETITIONER STATED HE WANTED A TRIAL, THE JUDGE ADVISED HIM THAT THE JURY WOULD BE LIKELY NOT ONLY TO FIND HIM GUILTY, BUT TO STORM OUT OF THE JURY BOX AND LYNCH HIM RIGHT IN THE COURTROOM.

QUESTION 2: WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE, THE NO CONTEST PLEA WAS INVALID BECAUSE OF NO ADVICE ON THE ELEMENTS OF SECOND DEGREE MURDER.

QUESTION 3: WHETHER THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO MOVE TO SUPPRESS PETITIONER'S STATEMENT TO POLICE BECAUSE OF NOT BEING ALLOWED TO MAKE A PHONE CALL UNTIL AFTER HE MADE A STATEMENT.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

  STATEMENT OF PROCEEDINGS 3

  STATEMENT OF FACTS 5

REASONS FOR GRANTING THE WRIT 9

  QUESTION I 9

  QUESTION II 20

  QUESTION III 25

CONCLUSION 30

APPENDIX A1

Sixth Circuit order, 4/11/01 A1

United States District Court ruling, 11/9/00 A2

United States District Court ruling, 10/13/00 A9

Report and Recommendation, 7/5/00 A23

Michigan Supreme Court order, 8/30/96 A72

Michigan Court of Appeals ruling, 11/28/95 A73

INDEX OF AUTHORITIES

Cases

Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) 26, 29

Blackburn v. Alabama, 361 U.S. 199; 80 S.Ct. 274; 4 L.Ed.2d 242 (1960) 27

Boykin v. Alabama, 395 U.S. 238; 89 S.Ct. 1709; 23 L.Ed.2d 274 (1969) 22

Brady v. United States, 397 U.S. 742; 90 S.Ct. 1463; 25 L.Ed.2d 747 (1970) 12, 16

Brooks v. Florida, 389 U.S. 413; 88 S.Ct. 541; 19 L.Ed.2d 643 (1967) 27

Brown v Illinois, 422 US 590; 95 SCt 2254; 45 LEd2d 416 (1975) 27

Chambers v. State of Florida, 309 U.S. 227; 60 S.Ct. 472; 84 L Ed 716 (1940) 14

Corsa v. Anderson, 443 F. Supp. 176 (E.D. Mich. 1977) 29

Finch v. Vaughn, 67 F.3d 909 (11th Cir. 1995) 13, 22

Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) 29

Gravley v. Mills, 87 F.3d 779 (6th Cir. 1996) 29

Henderson v. Morgan, 426 U.S. 637; 96 S.Ct. 2253; 49 L.Ed.2d 108 (1976) 20, 21, 22, 23

Hohn v. United States, 524 US 236 (1998) 3

Hutto v. Ross, 429 U.S. 28; 97 S.Ct. 202; 50 L.Ed.2d 194 (1976) 27

Iaea v. Sunn, 800 F.2d 861 (9th Cir. 1986) 15

In the Matter of Del Rio, 400 Mich. 665 (1977) 16
Kowalak v. United States, 645 F.2d 534 (6th Cir. 1981) 29
LoConte v. Dugger, 847 F.2d 745, 750 (11th Cir.) 13, 22
Machibroda v. United States, 368 U.S. 487; 82 S.Ct. 510; 7 L.Ed.2d 473 (1962) 12
McDonald v. Kropp, 373 F.2d 549 (6th Cir. 1967) 12, 20
Medina v. Barnes, 71 F.3d 363 (10th Cir. 1995) 29
Michael Williams v. Taylor, 120 S.Ct. 1479 (2000) 29
Mincey v. Arizona, 437 U.S. 385; 98 SCt 2408; 57 LEd2d 290 (1978) 27
Moore v. Dempsey, 261 U.S. 96; 43 S.Ct. 265; 67 L Ed 543 (1923) 14
People v. Cavanaugh, 246 Mich. 680 (1929) 28
People v. DeLisle, 183 Mich. App. 713 (1990) 27
People v. Dykhouse, 418 Mich. 488 (1984) 17, 21
People v. Eloby, 215 Mich. App. 472 (1996), 26
People v. Johnson, 386 Mich. 305 (1971) 12
People v. Martinez, 123 Mich. App. 145 (1983) 26
People v. Summers, 15 Mich. App. 346 (1968) 27
People v. White, 411 Mich. 366 (1981) 26
Schneckloth v. Bustamonte, 412 U.S. 218; 93 S.Ct. 2041; 36 L.Ed.2d 854 (1973) 27
Sinistaj v. Burt, 66 F.3d 804 (6th Cir. 1995); 22
Smith v. O'Grady, 312 U.S. 329; 61 S.Ct. 572; 85 L Ed 859 (1941) 22
Stano v. Dugger, 921 F.2d 1125, 1142 (11th Cir. 1991) 15

State v. Benfield, 264 N.C. 75; 140 S.E.2d 706 (1965) 13

State v. Byrd, 63 Ohio St 2d 288; 407 N.E.2d 1384 (1980) 13

State v. Svoboda, 205 Neb. 175; 287 N.W.2d 41 (1980) 13

Strickland v. Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984) 26, 28

Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602; 36 L.Ed.2d 235 (1973) 26

United States v. Porterfield, 624 F.2d 122 (10th Cir. 1980) 29

United States v. Smith, 60 F.3d 595 (9th Cir. 1995) 21, 23

Wilson v. Cowan, 578 F.2d 166 (6th Cir. 1978) 29

Statutes

M.C.L. 750.136b 18

M.C.L. 750.321 18

Other Authorities

C.J.I.2d 16.5 17

Rules

M.C.R. 6.302(D) 26

Constitutional Provisions

U.S. Const., Amend. XIV 12, 22

No. ____________________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

BRIAN GARCIA,

Petitioner,

vs.

CAROL HOWES,

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

BRIAN GARCIA, Petitioner, by and through his attorney, James S. Lawrence, moves this Court to issue a Writ of Habeas Corpus to review his conviction and sentence from the Circuit Court for Berrien County, Michigan, entered May 16, 1994.

OPINIONS BELOW

The order of the 6th Circuit Court of Appeals of April 11, 2001, for Oakland County, Michigan is attached in the Appendix. The following documents from the United States District Court, Western District of Michigan, are in the Appendix: Memorandum Opinion, November 9, 2000, Order Denying Motion for Certificate of Appealability, November 9, 2000, Opinion Adopting Report and Recommendation, October 13, 2000, Report and Recommendation, July 5, 2000. The order of the Michigan Supreme Court of August 30, 1996, and the opinion of the Michigan Court of Appeals of November 28, 1995, are also attached in the Appendix.

STATEMENT OF JURISDICTION.

This case began as a criminal prosecution in Berrien County, Michigan, Circuit Court. The original judgment was entered May 16, 1994. The opinion of the Michigan Court of Appeals was issued November 28, 1995. The final judgment of the Michigan Supreme Court was issued August 30, 1996. The Judgment of the United States District Court was October 13, 2000. The Order denying Certificate of

Appealability was issued by the District Court November 9, 2000, and by the Sixth Circuit Court of Appeals April 11, 2001. This Court has jurisdiction over this original Petition for Habeas Corpus pursuant to 28 U.S.C. 2241 and the rule announced in *Hohn v. United States*, 524 US 236 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Statement of Proceedings

Petitioner Brian Garcia was charged with second degree murder in the death of Shawn Bagarus, an infant he was watching for his girlfriend, the mother. The charges were in the Berrien County, Michigan Circuit Court before Judge

John T. Hammond.

On April 4, 1994, Petitioner appeared in court with the attorneys understanding that Petitioner would pled no contest to second degree murder. (T Apr 4, 3). Petitioner went partway through the plea taking procedure. However, during the procedure, Petitioner indicated that he did not want to enter the plea. (T Apr 4, 7-8). The judge recessed for attorney-client consultation. Petitioner returned and confirmed he wanted a trial. (T Apr 4, 10).

On Friday, April 8, 1994, Petitioner and counsel appeared to argue against a motion by the prosecutor to admit an alleged similar act, i.e., that Petitioner once slapped someone. (T Apr 8, 3-4). In the course of that hearing, the Court made the following comments (T Apr 8, 12):

> "THE COURT: And if the jury buys the version of the defendant's - what it is - third or fourth statement - whichever particular one - about bashing the kid's head 20 or 30 times, they're not only likely to find him guilty, they're likely to be ready to storm out of the jury box and lynch him right here."

On Monday, April 11, 1994, Petitioner again appeared before Judge Hammond. This time, Petitioner went through with the plea. He pled no contest to second degree murder. The agreement was that he would be sentenced within the lower 2/3 of the Michigan sentencing guidelines, which guidelines were 10 to 25 years. (Plea, 6). The factual basis for the plea was taken from the transcript of the preliminary examination and the autopsy report. (Plea, 9). On May 16, 1994, Judge Hammond sentenced Petitioner to prison for 20 to 50 years. (Sent, 11-12).

On November 28, 1995, the Michigan Court of Appeals affirmed Petitioner's conviction and sentence. Case No. 175911. On August 30, 1996, the Michigan Supreme Court denied leave to appeal. Case No. 105322.

Statement of Facts

Scott Clark testified that his 18 year old daughter Courtney Clark was dating Petitioner Brian Garcia. Her son was Shawn Bagarus. (PET, 4-5). He never saw marks on the child. (PET, 7).

Off. Robert Dings testified that on January 12, 1994, he responded to a 911 call at 808 W. Front St. in Buchanan. (PET, 9). Petitioner had called 911. (PET, 45). When Off. Dings arrived, another officer was giving the child CPR. (PET, 10). Petitioner was present. (PET, 10). Petitioner made statements. (PET, 12-13, 18-27). The child subsequently died. (PET, 14).

The autopsy report showed that the child was 8 months old, and died from multiple comminuted cranial fractures, with accompanying soft tissue hemorrhage. There were also bilateral retinal hemorrhages. Other than the described damage to the head, the child had no other recent or old injuries.

At sentencing, Petitioner told the Court (Sent, 9-10):

> "Shawn's death was an accident caused by my carelessness and rough play. If I was aware that what I was doing was going to hurt Shawn, I wouldn't have done it...I never intended to do anything to hurt him."

The Magistrate's report states "petitioner gave three separate stories to the officer, finally conceding that he had struck the child's head on the ground twenty to thirty times." This is completely untrue, and may account for the District Court and Court of Appeals action. The transcript of his interrogation proves this.

Petitioner's first statement in the transcript did not include any striking whatever. (Interr, 9-12). Petitioner then said:

> "GARCIA: I never hit Shawn. I never did hit Shawn in the head or struck him in any way." (Interr, 12).
>
> "GARCIA: I did not throw him, no. I would not throw a kid, ever." (Interr, 20).

"DINGS: I don't believe it. The Dr. said the back of his head was crushed. That's not going to happen from hitting a table, it's not gonna happen, man. I'm not crazy, I can think just like you. I have reasoning and deduction that tells me that that baby's head is not going to be smashed by hitting that table. A hairline fracture, yea. Smashed?

GARCIA: The only thing I can think of is that instead of laying him down gently, just letting him drop back, that's it." (Interr, 20)

"DINGS: You threw him down.

GARCIA: No, I didn't throw him down.

DINGS: You threw him down.

GARCIA: No, I would not throw him down.

DINGS: Come on.

GARCIA: I did not throw him down." (Interr, 20-21).

"GARCIA: He was dressed already. He hit his head, and like I said, he wouldn't shut up. So, I laid him down, gave him the pacifier, he would not stop and wouldn't keep it in his mouth. I sat him up, pick him up, he wouldn't stop crying. I sat him down, push him down, I kept on doing that.

DINGS: You pushed him down again, then you ...

GARCIA: Yea, pushed him down, pushed him back. Pick him up, let him down again, pick him up, let him down again, he wouldn't shut up.

DINGS: How many times did you do that? 3, 10, tell me Brian.

GARCIA: About 20 times." (Interr, 23).

"GARCIA: Um, that's when I got up and I was up with him, and played with him and twirled him around and that's when he hit his head." (Interr, 26).

"DINGS: Alright, he hit his head and then he wouldn't quit crying. You took him over and you laid him down where I found him.

GARCIA: Right.

DINGS: Ok. He wouldn't quit crying, so you pushed him down.

GARCIA: I took him and I shoved him down, and then he kept trying to spit out his pacifier so

DINGS: So he could cry.

> GARCIA: Yea. I'd shove him down, he'd loose his pacifier." (Interr, 27).

In other words, Petitioner said that he took the baby and sat him down, picked him up, and pushed him down, about 20 to 30 times. He did not say he struck the baby's head on the ground 20 or 30 times.

He also said that when he twirled the baby around, the baby hit his head. He said that happened one time. Even if you stretch that to be the Defendant striking the baby's head, that is once, not 20 to 30 times.

REASONS FOR GRANTING THE WRIT

QUESTION 1: WHETHER PETITIONER'S NO CONTEST PLEA TO MURDER WAS COERCED AND INVOLUNTARY WHERE, AFTER PETITIONER STATED HE WANTED A TRIAL, THE JUDGE ADVISED HIM THAT THE JURY WOULD BE LIKELY NOT ONLY TO FIND HIM GUILTY, BUT TO STORM OUT OF THE JURY BOX AND LYNCH HIM RIGHT IN THE COURTROOM.

This case should be accepted and a ruling issued on the merits to determine precisely under what circumstances threats and warnings issued by a judge to a defendant who refuses to plead guilty makes the subsequent guilty or no contest plea involuntary. There are cases where a defendant pleads guilty because of a threat, with rules that on their face seem to invalidate such pleas. What makes this case unique is that no speculation or determination of witness credibility is needed to determine the exact nature of the threats. In this case, the threats were placed on the record.

Guilty and no contest pleas are well-liked by judges, in that they take only a few minutes, in contrast to trials that can take days. To a busy judge trying to clear a docket, every defendant who pleads guilty or no contest rather than insisting on a trial constitutes a major burden being lifted from the shoulders of the judge. Under the circumstances, it is not surprising that some judges would try to gently persuade a defendant to take a guilty plea. The problem arises where a judge goes beyond gentle persuasion and tries to terrorize the defendant. By "terrorize," we mean the action of a judge designed to fill a defendant with terror and panic, not by providing factual information, but by painting a horror-filled scenario.

Judges should have some guide as to how far they can go in inducing a guilty plea. We submit that in this case, the judge went way, way too far. The decision of the Sixth Circuit that there is no legal issue here even worthy of discussion is unreasonable.

Petitioner Brian Garcia submits to this Court that the actions of Circuit Court John Hammond coerced him into a plea, and rendered his plea involuntary. Faced with a defendant that did not want to plead, the judge gratuitously told Petitioner he was likely to lose at trial, and also to face an angry, violent mob of jurors that would want to lynch him.

On April 4, 1994, Petitioner appeared in court with the attorneys understanding that Petitioner would pled no contest to second degree murder. (T Apr 4, 3). Petitioner went partway through the plea taking procedure. However, during the procedure, Petitioner indicated that he did not want to enter the plea. (T Apr 4, 7-8). The judge recessed for attorney-client consultation. Petitioner returned and confirmed he wanted a trial. (T Apr 4, 10).

On Friday, April 8, 1994, Petitioner and counsel appeared to argue against a motion by the prosecutor to admit an alleged similar act, i.e., that Petitioner once slapped someone. (T Apr 8, 3-4). In the course of that hearing, the Court made the following comments (T Apr 8, 12):

> "THE COURT: And if the jury buys the version of the defendant's - what it is - third or fourth statement - whichever particular one - about bashing the kid's head 20 or 30 times, they're not only likely to find him guilty, they're likely to be ready to storm out of the jury box and lynch him right here."

That was Friday. On Monday, April 11, 1994, Petitioner again appeared before Judge Hammond. This time, Petitioner went through with the plea, pleading no contest to second degree murder.

A plea that is coerced is unconstitutional and void. U.S. Const., Amend. XIV. The leading United States Supreme Court case on coercion and involuntary pleas is *Machibroda v. United States*, 368 U.S. 487; 82 S.Ct. 510; 7 L.Ed.2d 473 (1962) [cited in *People v. Johnson*, 386 Mich. 305 (1971)]. The Court in *Machibroda* ruled, 368 U.S. at 463:

> "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary plea is void."

Similarly, in *Brady v. United States*, 397 U.S. 742, 751; 90 S.Ct. 1463; 25 L.Ed.2d 747 (1970), the Court held that:

> "the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."

In *McDonald v. Kropp*, 373 F.2d 549 (6th Cir. 1967), the Court held that "a plea which is the product of coercion and false promises cannot be tolerated." The Court rejected Petitioner's testimony and did believe the deputy that the threat incident did not happen. However, the Petitioner's allegation of a threat by the Sheriff that a mob was forming to take Petitioner out and hang him up, if believed, would have been enough to show an involuntary plea.

"Review of the voluntariness of a guilty plea and ineffective assistance of counsel is plenary because "these issues are mixed questions of fact and law ... subject to independent review on appeal." *LoConte v. Dugger,* 847 F.2d 745, 750 (11th Cir.), *cert. denied,* 488 U.S. 958, 109 S.Ct. 397, 102 L.Ed.2d 386 (1988)." *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995).

A plea is involuntary where the judge becomes an advocate in persuading the defendant to plead guilty. This occurs where the judge tells a defendant that the evidence against him is overwhelming, *State v. Svoboda*, 205 Neb. 175; 287 N.W.2d 41 (1980), or when "the judge's active conduct could lead a defendant to believe he cannot get a fair trial." *State v. Byrd*, 63 Ohio St 2d 288; 407 N.E.2d 1384 (1980).

In *State v. Benfield*, 264 N.C. 75; 140 S.E.2d 706 (1965), the Court held that "The fact that the court interrupted the hearing before all the evidence was in to express the opinion that the jury would convict defendant, followed by the statement that, if convicted, defendant could expect 'a long sentence,' necessarily leads, we think, to the conclusion that defendant changed his plea from not guilty to guilty because of what the judge said."

It is bad enough when the judge threatens a defendant with a prediction he will lose the case. This judge went much further. Petitioner was threatened with a lynch mob if he dared to present his case to a jury. Between the Friday threat and the Monday court appearance, Petitioner swiftly changed his mind from insisting on a trial to consenting to a no contest plea.

The threat of physical violence makes a defendant's statement involuntary. *Moore v. Dempsey*, 261 U.S. 96; 43 S.Ct. 265; 67 L Ed 543 (1923). A criminal defendant is entitled to a "tribunal free of prejudice, passion, excitement and tyrannical power." Due process was denied where "the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation." *Chambers v. State of Florida*, 309 U.S. 227; 60 S.Ct. 472; 84 L Ed 716 (1940). That is the very thing that Petitioner was threatened with by the judge: an angry mob. [1]

Petitioner had an attorney to advise him on various matters, including his chances of success. By making a prediction of the results, the judge interfered with the attorney-client relationship, by placing more pressure on Petitioner than the actual defense attorney did, in an effort to convince the Petitioner to plead. And, the judge succeeded where attorney Jesse failed. With attorney Jesse advising him, Petitioner wanted a trial. With the judge advising him, Petitioner was ready to plead.

---

[1] Petitioner has also relied on statements made by the judge later at the April 8 proceeding. Specifically, the judge mentioned that his office received a warning that a member of the deceased's family was so outraged that the informant feared the relative would "come into the courtroom and summarily do - do away with the defendant on the spot." (T Apr 8, 18-19).

It is particularly important that the threat came directly from the judge. After all, "Acts that might constitute coercion if made by the court or a prosecutor may not rise to that level if done by others." *Iaea v. Sunn*, 800 F.2d 861 (9th Cir. 1986). As the Court noted in *Stano v. Dugger*, 921 F.2d 1125, 1142 (11th Cir. 1991):

> "Unavoidable influence or pressure from sources such as codefendants, friends or family does not make a plea involuntary; it is where the plea is coerced by conduct fairly attributable to the state that the due process clause of the 14th Amendment is offended."

In other words, if your mother tells you you are going to lose the case, that is not coercion. If the judge tells you you are going to lose the case, that is coercion.

What possible legitimate purpose could a judge have for telling a defendant that he is going to lose? What possible legitimate purpose could a judge have for telling a defendant that the jury will want to lynch him? The topic of the hearing, similar acts testimony, did not require the judge to evaluate the believability of the Petitioner's case, nor did it require the judge to predict a jury seized with the uncontrollable passion of a lynch mob.

However, one purpose did require those actions: the purpose of avoiding the trial altogether. If the judge could convince the Petitioner that he could not win, and that trying to win would result in his summary execution by a mob, that would cause Petitioner to abandon his plans for trial and enter the no contest plea that meant less work for the court. To tell the defendant he is going to lose, and then to threaten him with an angry, violent mob, was to "produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady v. United States*, supra.

In *In the Matter of Del Rio*, 400 Mich. 665 (1977), the Michigan Supreme Court found a plea to be coerced in a similar situation. [2]

---

[2] "The defendants informed defense counsel and respondent of their emphatic desire to go to trial. Respondent requested the defendants and defense counsel to approach the bench. An ex parte communication ensued, the prosecutor not being present. During the 'negotiations' about taking a plea, respondent [the judge] expressed the opinion he 'was quite certain they would be found guilty'. ... The court is required to ascertain the existence of any coercion. Contrary to all

Petitioner had absolutely no prior contact with the criminal justice system. The judge had a lot of experience. Petitioner could not reasonably be expected to ignore the judge's opinion. The judge had no business making any predictions whatsoever, much less predicting mob violence against Petitioner by the jury. The predictions, whether you call them warnings or threats, were coercive, were intended to coerce, and did in fact coerce.

While a coerced plea is unconstitutional and voidable even if the Petitioner had no valid defense to present at trial, this Petitioner did have a valid defense. Under Michigan law, murder occurs when:

> "the defendant had one of these three states of mind: he intended to kill, or he intended to do great bodily harm, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions." C.J.I.2d 16.5; in accord see *People v. Dykhouse*, 418 Mich. 488, 495 (1984).

Petitioner, at sentencing, said (Sent, 9-10):

> "Shawn's death was an accident caused by

---

these safeguards, Judge Del Rio himself improperly coerced pleas!"

> my carelessness and rough play. If I was aware that what I was doing was going to hurt Shawn, I wouldn't have done it...I never intended to do anything to hurt him."

Petitioner Brian Garcia was a 23 year old man babysitting with his girlfriend's baby. He had had no arguments with the girlfriend, no reason to want to hurt her. A jury might well believe him that he had no intention to kill the baby, or to cripple the baby. A jury might well believe him that he did not know his actions were going to cause death, and that if he had known, he wouldn't have performed those actions. In other words, it is very plausible that a jury might find Brian Garcia, by rough handling of the infant, was guilty of gross negligence or ordinary negligence, [3] but that he did not know that the child was likely to die.

In fact, upon realizing that the child was in distress, Petitioner frantically called 911 looking for help. (PET, 21).

Contrary to the judge's statement, the Petitioner never said that he "bashed the kid's head 20 or 30 times." According to the officer, Petitioner said he was playing with the baby, putting the baby down and picking him up. He said he might have done that 20 or 30 times. (PET, 26). Significantly, the autopsy report indicates no prior abuse of any sort.

---

[3] If guilty of gross negligence, the proper conviction would be manslaughter, which carries up to 15 years. M.C.L. 750.321. If guilty of ordinary negligence amounting to reckless conduct, the proper conviction would be second degree child abuse, which carries up to 4 years. M.C.L. 750.136b.

Also significant is that Brian Garcia had moved in together with the baby and her mother less than 2 weeks before the death. (PET, 19).

A 23 year old man has many interests. Assassinating babies is normally not one of them. Courtney, Shawn and Petitioner moved in together to have a life together. To kill your girlfriend's baby is not calculated to enhance that interest. The death of an infant creates a very depressing atmosphere in any family, even if you are not blamed for it.

The proposition that Brian Garcia wanted a dead baby is not nearly as plausible as Brian Garcia not realizing until too late that the baby was seriously injured. At the same time, the original charge was second degree murder, creating no risk of a first degree murder conviction at trial. There were good reasons for him to have a trial.

Brian Garcia did not believe he was guilty of murder. He refused to plead on April 4. That is why on April 8 the judge decided to help things along by advising him that even the jury would want to lynch him. Suddenly, on Monday, Petitioner fell into line, pleading exactly as the judge wanted him to.

There were defenses that Petitioner could raise, and that

Petitioner was induced not to have a trial where they could be raised, by coercive actions of the judge.

In *McDonald v. Kropp*, supra, the 6th Circuit held that if they believed that the Petitioner was presented by police with prediction of mob violence if he went to trial, they would find that the plea was involuntary. In *McDonald v. Kropp*, they did not believe the petitioner. What is critically different about this case is that the use of the threat of mob violence as an inducement to plead appears in the record itself; Petitioner's credibility vis a vis the threatening party is not even an issue.

This Court should find that the judge's actions in trying to persuade Petitioner to plead to second degree murder were coercive, and that the plea was therefore involuntary. This Court should grant Habeas Corpus, and require vacation of the plea and conducting of a new trial in the matter.

QUESTION 2: WHETHER UNDER THE CIRCUMSTANCES OF THIS CASE, THE NO CONTEST PLEA WAS INVALID BECAUSE OF NO ADVICE ON THE ELEMENTS OF SECOND DEGREE MURDER.

This case should be accepted and a ruling issued on the merits to determine whether *Henderson v. Morgan*, 426 U.S. 637; 96 S.Ct. 2253; 49 L.Ed.2d 108 (1976) has any continuing vitality, or whether it is a dead letter as the United States District Court and Sixth Circuit Court of Appeals seem to think.

The record of the plea demonstrates that at no time during the plea, or any any other time, did the court advise Petitioner as to what were the elements of second degree murder. The court did mention the penalty for second degree murder, but not what constitutes the crime. (Plea, 3).

Under Michigan law, murder occurs when:

> "the defendant had one of these three states of mind: he intended to kill, or he intended to do great bodily harm, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions." CJI2d 16.5; in accord see *People v. Dykhouse*, 418 Mich. 488, 495 (1984).

That is what we submit the judge should have informed Petitioner Garcia before accepting his no contest plea to second degree murder in the death of a child.

In *Henderson v. Morgan*, 426 U.S. 637; 96 S.Ct. 2253; 49 L.Ed.2d 108 (1976), the court overturned a guilty plea to second degree murder where the judge did not adequately explain to the defendant what would constitute the offense. In *United States v. Smith*, 60 F.3d 595 (9th Cir. 1995), the court overturned a guilty plea where the judge did not adequately explain to the defendant what would constitute the offense of bank robbery. See also *Smith v. O'Grady*, 312 U.S. 329; 61 S.Ct. 572; 85 L Ed 859 (1941); *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995).

We do not take the position that every single crime must be explained in exhaustive detail in order to permit a guilty plea. However, due process of law requires that a guilty plea must be "knowing" and "intelligent." U.S. Const., Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238; 89 S.Ct. 1709; 23 L.Ed.2d 274 (1969); *Sinistaj v. Burt*, 66 F.3d 804 (6th Cir. 1995); *Finch v. Vaughn*, supra. It is the nature of the elements of the crime, and the nature of the facts, that shows how much explanation is required. "A guilty plea, which works as a waiver of numerous constitutional rights, cannot be truly voluntary if the defendant 'has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.'" *Henderson v. Morgan*, supra.

"Review of the voluntariness of a guilty plea and ineffective assistance of counsel is plenary because "these issues are mixed questions of fact and law ... subject to independent review on appeal." *LoConte v. Dugger,* 847 F.2d 745, 750 (11th Cir.), *cert. denied,* 488 U.S. 958, 109 S.Ct. 397, 102 L.Ed.2d 386 (1988)." *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995). The Michigan Court of Appeals simply ruled that Petitioner must lose because the court complied with Michigan court rules, and Petitioner said "he understood the effects of his nolo contendere plea." (Opinion, 1). Petitioner did indeed understand that he was pleading to second degree murder, and what the penalty was. Those were the "effects" of the plea.

However, knowing the "effects" of a plea is not enough to make it a voluntary, knowing and intelligent plea. *Henderson v. Morgan*, supra; *United States v. Smith*, supra. Petitioner knew what he did and what he didn't do. He knew his physical acts led to the death of the baby. What he did not know is whether this would be murder or not. Without that knowledge, the plea cannot reasonably be said to be voluntary, knowing and intelligent.

It must be remembered that this is not a case in which the intent of the accused is obvious. Petitioner did not shoot, stab, or threaten to kill. The life of a baby is very fragile. A person could physically cause death, and yet not know that he was creating "a very high risk of death or great bodily harm" A person could physically cause death, not "knowing that death or such harm was the likely result of his actions." Indeed, a person could physically cause death by actions where death was not the likely result, but death happened anyway. In any of these cases, the accused would not be guilty of murder even though he killed.

Similarly, this is not a case in which the elements of the crime are obvious. The standard of "knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions" as constituting the intent for second degree murder is far from obvious. It is not obvious to the layperson that intentional acts of the accused, leading to death, would not be murder unless the accused "knowingly created a very high risk of death or great bodily harm knowing that death or such harm was the likely result of his actions."

It must also be noted what Petitioner said at sentencing (Sent, 9-10):

> "Shawn's death was an accident caused by my carelessness and rough play. If I was aware that what I was doing was going to hurt Shawn, I wouldn't have done it...I never intended to do anything to hurt him."

Petitioner's statement at sentencing, if true, would show an absence of the mental state necessary for second degree murder. Petitioner should have been informed of those elements, so he could **intelligently** decide whether to enter the plea. His plea was not knowing and intelligent, and therefore not voluntary.

This Court should grant Habeas Corpus and overturn this plea so the case can be tried, so Petitioner's actions can be measured against the actual legal standard, rather than against ignorance and fear.

QUESTION 3: WHETHER THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO MOVE TO SUPPRESS PETITIONER'S STATEMENT TO POLICE BECAUSE OF NOT BEING ALLOWED TO MAKE A PHONE CALL UNTIL AFTER HE MADE A STATEMENT.

This case should be accepted and a ruling issued on the merits to determine the propriety of holding a defendant incommunicado and allowing him a phone call only after he gives in to police pressure to make a statement.

The police report of Off. Dings makes it clear that Petitioner was not permitted to make a call until after he made a statement satisfactory to the officer. "After concluding my interview with Brian I allowed him to make phone calls to family and whomever he wanted to let them know his situation." (Police Report, p. 11).

Petitioner informed his trial court counsel about how the statement had been extracted by the officer disallowing phone calls until the officer had a statement satisfactory to him. (In Affidavit submitted to Michigan Court of Appeals as Exhibit C, and to federal court).

Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602; 36 L.Ed.2d 235 (1973) provides that a guilty plea normally waives objection to improperly collected evidence that was not the basis of the finding of guilt. Normally, in the guilty plea, it is the defendant's admissions, not the evidence collected by police, that the conviction is based upon.

However, in this case, we have a no contest plea. The judge used the preliminary examination transcript and the autopsy report as the factual basis for the plea. The exam transcript contained the defendant's statements. The statements were an essential part of the record upon which the finding of guilt rested. Without those statements, there is not even arguably sufficient evidence for second degree murder. Without those statements, the factual basis for a finding of second degree murder, required under Michigan law for a guilty or no contest plea, M.C.R. 6.302(D); *People v. White*, 411 Mich. 366 (1981); *People v. Martinez*, 123 Mich. App. 145 (1983); *People v. Eloby*, 215 Mich. App. 472 (1996), would not be present.

A criminal defendant is entitled to the effective assistance of counsel in the trial court. *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974); U.S. Const., Amend. VI.

The standard employed under *Strickland* asks whether the actions of the attorney were "reasonable under prevailing professional norms" and, if not, whether they prejudiced the defendant.

The totality of circumstances are to be considered in determining whether defendant's confession was involuntary. *Brown v. Illinois*, 422 U.S. 590; 95 SCt 2254; 45 LEd2d 416 (1975); *Schneckloth v. Bustamonte*, 412 U.S. 218; 93 S.Ct. 2041; 36 L.Ed.2d 854 (1973). An involuntary or coerced statement is inadmissible either as direct evidence or for impeachment purposes. *Mincey v. Arizona*, 437 U.S. 385; 98 SCt 2408; 57 LEd2d 290 (1978).

"A confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Hutto v. Ross*, 429 U.S. 28; 97 S.Ct. 202; 50 L.Ed.2d 194 (1976).

Numerous cases have held that keeping a prisoner incommunicado is a relevant factor toward finding a statement involuntary, and some have suppressed a statement on that ground alone. *People v. DeLisle*, 183 Mich. App. 713, 721 (1990); *People v. Summers*, 15 Mich. App. 346, 352 (1968); *Brooks v. Florida*, 389 U.S. 413; 88 S.Ct. 541; 19 L.Ed.2d 643 (1967); *Blackburn v. Alabama*, 361 U.S. 199, 206; 80 S.Ct. 274; 4 L.Ed.2d 242 (1960).

The wrongfulness of this practice, and the effect of this practice, were recognized by the Michigan Supreme Court as early as 1929. In *People v. Cavanaugh*, 246 Mich. 680, 686 (1929), the Court held:

> "A voluntary confession of commission of an established crime is evidence long sanctioned, but a confession, extorted by mental disquietude, induced by unlawfully holding an accused incommunicado, is condemned by every principle of fairness, as all the evils of the old time *letter de cachet*, is forbidden by the constitutional guarantee of due process of law, and inhibited by the right of an accused to have the assistance of counsel. An accused may be apprehended and held in safe custody to answer an accusation in court, **but the custodian of this person possesses no inquisitorial power or right to hold him incommunicado while endeavoring to exact a confession.** Holding an accused incommunicado to parents and counsel is a subtle and insidious method of intimidating and cowing, tends to render a prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure." [emphasis added]

A reasonable attorney would have been aware of this precedent. A reasonable attorney would have presented the issue before having his client plead guilty as charged.

In *Strickland v. Washington*, supra, the Supreme Court held that prejudice is shown from ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 664. Under *Strickland*, the defendant need not make the higher showing that "counsel's deficient performance more likely than not altered the outcome of the case." 466 U.S. at 693. However, in this case both the lower standard of *Strickland* and the higher standard rejected by *Strickland* are met. The outcome of Petitioner's state court case has been altered, and altered seriously, by the ineffective assistance. But for the Petitioner's statements, the factual basis for a no contest plea, required under Michigan law, would have been absent. There could have been no conviction of second degree murder.

The critical failure of an attorney to object can be ineffective assistance of counsel if it deprives the defendant of an opportunity for dismissal of the case or for success on appeal. *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996); *Kowalak v. United States*, 645 F.2d 534, 537-538 (6th Cir. 1981).

Failure of defense counsel to adequately investigate or present a defense also constitutes ineffective assistance of counsel. *Wilson v. Cowan*, 578 F.2d 166 (6th Cir. 1978); *Beasley v. United States*, supra; *United States v. Porterfield*, 624 F.2d 122 (10th Cir. 1980); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978).

An evidentiary hearing should be held. *Michael Williams v. Taylor*, 120 S.Ct. 1479 (2000); *Medina v. Barnes*, 71 F.3d 363 (10th Cir. 1995). Petitioner presented the claim to the Michigan appellate courts, and requested a hearing of those courts, therefore this Court should conduct an evidentiary hearing. With or without the evidentiary hearing, this Court should find that reasonable counsel would have tried to suppress the statement before having his client plead guilty as charged without a plea bargain. This Court should therefore overturn the conviction for ineffective assistance of counsel, and remand the case for trial.

CONCLUSION

Petitioner Brian Garcia respectfully submits that for the reasons stated above, this Court should grant plenary consideration, and upon consideration grant a Writ of Habeas Corpus.

Respectfully submitted,

JAMES STERLING LAWRENCE (P33664)
Attorney for Petitioner Garcia
One Kennedy Square, Suite 500
Detroit, MI 48226
(313) 965-4189
Dated: July 3, 2001

Filed April 11 2001
Leonard Green, Clerk

No. 00-2363

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIAN GARCIA,
Petitioner-Appellant

v.

ORDER

CAROL HOWES, Warden,
Respondent-Appellee.

Before: MARTIN, Chief Judge.

Brian Garcia, a Michigan prisoner proceeding through counsel, appeals a district court order denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Garcia requests a certificate of appealability pursuant to Fed. R. App. P. 22(b).

A certificate of appealability may issue only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). Upon review, the court concludes that Garcia has failed to make such a showing. The application for a certificate of appealability is denied.

ENTERED BY ORDER OF COURT
Leonard Green
Clerk

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN GARCIA,
Petitioner,

Case No. 1:97cv 688

Honorable Douglas W. Hillman

v.

MEMORANDUM OPINION

CAROL HOWES,
Respondent.

This was a habeas corpus action brought by a state prisoner through counsel pursuant to 28 U.S.C. § 2254. By judgment entered October 13, 2000, this court denied the petition for habeas relief in all respects. The court's judgment followed its *de novo* review of extensive objections filed by petitioner's counsel to the 42-page report and recommendation submitted by the magistrate judge. Petitioner's counsel has now filed a timely notice of appeal and motion for the issuance of a certificate of appealability.

Under the revised provisions of the Habeas Corpus Act, a petitioner may not appeal in a habeas case unless a circuit justice or judge issues a certificate of appealability (formerly known as a certificate of probable cause). 28 U.S.C. § 2253(c)(1). Amended Rule 22 of the Federal Rules of Appellate Procedure extends to district judges the authority to issue a certificate of appealability as well. FED. R. APP.

P. 22(b)(*1); accord Lyons v. Ohio Adult Parole Auth*., 105 F.3d 1063, 1073 (6th Cir.), cert, denied, 520 U.S. 1224 (1997). A certificate of appealability may he issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has rejected a habeas claim on the merits, section 2253(c) requires petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." *Slack v. McDaniel*, 120 S. Ct. 1595, 1604 (2000). When the claim is denied on procedural grounds, without consideration of the merits of the claim, the petitioner must show both that reasonable jurists would find it debatable that the petition states a valid constitutional claim and that they would "find it debatable whether the district court was correct in its procedural ruling." Id. Petitioner's counsel identifies three issues that assertedly meet this test. The court will consider each in turn.

Petitioner's first claim is that the court erred by according the presumption of correctness, 28 U.S.C. § 2254(e)(1), to findings by the state court of appeals concerning the voluntariness of petitioner's guilty plea. The original petition asserted that petitioner's plea of guilty was rendered involuntary by certain allegedly coercive comments and threats made by the trial judge at a previous hearing. The magistrate judge (R&R. 20-21, docket # 22) found that the decision of the state court of appeals contained certain underlying findings of historical fact that must be accorded a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). Upon de novo review, this court recognized that the voluntariness of a plea is a question of law, but that subsidiary factual findings are questions of fact subject to the presumption of correctness. (Op., 6. docket t# 26). The court agreed with the magistrate judge that the findings of the court of appeals were indeed subsidiary factual findings entitled to the presumption. However, the court went on to find that even if the issue were deemed a mixed question of law and fact, the holding of the state court of appeals must nevertheless be upheld under the standard prescribed by AEDPA, 28 U.S.C. § 2254(d), for review of such mixed questions. (Id.).

Consequently, the motion for a certificate of probable cause is seriously misleading, as it ignores this court's alternative ground for upholding the finding of the state court of appeals, even if viewed as a mixed question of law and fact. Instead, the motion creates the false impression that this courts only rationale for upholding the state-court findings was provided by treating them as questions of fact. This court therefore reiterates its holding that, even viewed as mixed questions of law and fact, the findings of the state court of appeals are not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C § 2254(d); see Williams vs. Taylor, 120 S. Ct. 1495, 1523 (2000). Consequently, certification of the appealability of petitioner's "Issue I" would avail him nothing, as this court's rejection of his challenge to the voluntariness of his guilty plea would not be undermined by an appellate determination that the issue is a mixed question.

Petitioner next seeks a certificate of appealability concerning two aspects of the court's ruling on his second habeas claim, which was a challenge to the adequacy of the trial court's explanation of the elements of the offense. Counsel first challenges this court's finding that the issue was not exhausted in the state courts. Again, the motion is substantially misleading. Both the magistrate judge (R&R, 26-

27) and this court (Op., 8-9) did indeed find that this issue was not properly exhausted in the state courts. If that were the end of the court's analysis, however, the court would have been required to dismiss the entire petition without prejudice under the total exhaustion rule of *Rose v. Lundy*, 455 U.S. 518 (1982). See *O'Guinn v. Dutton*, 88 F.3d 1409, 1412 (6th Cir. 1996) (en banc) (petition containing even one unexhausted claim must be dismissed without prejudice in its entirety). Rather, his court exercised the discretion created by 28 U.S.C. § 2254(b)(2) to deny the habeas corpus claim on it merits, despite the lack of exhaustion. See *Mott v. Rivers*, No. 95-2164, 1997 WL 441793 (6th Cir. Aug.5, 1997). Both the magistrate judge and this court could not have made this point any clearer. Counsel nevertheless persists in raising this as a meritorious issue for appeal, despite the clear fact that the court's judgment did not rest upon a finding of nonexhaustion but upon a reject ion of the claim on its merits. Again, petitioner's cause would not be furthered by appellate review of this moot issue.

Counsel goes on to challenge, in a single paragraph, this court's dispositive finding on Issue II -- that his challenge to the adequacy of the plea colloquy lacked merit. Counsel essentially argues that a reasonable jurist could find that the Supreme Court's decision in Henderson v. Morgan, 426 U.S. 637 (1976), "continues to have validity." (Motion, 4, docket # 29). Neither this court nor the magistrate judge ever found otherwise. As is made clear by the extensive discussion by the magistrate judge (R & R, 28—32), the Henderson decision, properly understood, undermines petitioner's arguments. As the magistrate judge remarked at the end of the analysis, "The record conclusively establishes that petitioner's right to notification of the nature of the charge, as enunciated by the Supreme Court in Henderson and subsequent cases, was satisfied." (R&R,32). Rather than attempting to avoid the effect of Henderson, this court applied the decision in its entirety, refusing to take isolated statements out of context as urged by petitioner. A certificate of appealability should be issued only if jurist of reason would find it debatable whether the petition states a valid claim of a constitutional right. *Slack v.McDaniel*, 120 S. Ct. at 1604. Jurists of reason would not find petitioner's second claim debatable.

Next counsel seeks a certificate with regard to issue III of the petition, which now characterizes as a challenge to petitioner's pretrial confession on the grounds of police coercion. In truth, the third claim in the petition was not a direct challenge to the pretrial confession, but was a Sixth Amendment claim for ineffective assistance of counsel arising from his trial attorney failure to move to suppress the statement. Both the magistrate judge and this court applied the standards *of Strickland v. Washington*, 466 U.S. 688 (1984), finding that petitioner had failed to meet either prong of the *Strickland* standard. By arguing for appellate review of the simple issue whether petitioner's pretrial statement should have been suppressed, counsel evades the much more complex question whether trial counsel was constitutionally ineffective for failing to file a suppression motion. Counsel's present motion does not address this court's finding that trial counsel's conduct did not fall below an objective standard of reasonableness and that petitioner was not prejudiced in any event. Petitioner is not entitled to a certificate on this claim.

Finally, this court is compelled to comment upon petitioner's persistent reliance upon an inappropriate legal standard in seeking a certificate of appealability. Petitioner repeatedly argues that the certificate should issue unless an appeal would be frivolous, that is, if the appeal obviously lacks all merit or is prosecuted for delay, harassment, or another improper purpose. This is decidedly not the law, and a habeas petitioner must show more than a lack of frivolity to justify appeallate review. To satisfy the requirements of 29 U.S.C. § 2253©, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." Slack, 120 S.Ct. at 1604. A petitioner's constitutional claim must therefore be "substantial," rather than merely nonfrivolous. Id. Although this standard certainly allows appellate consideration of many habeas claims rejected in the district court, such claims must be far more meritorious than those present here.

For the foregoing reasons, petitioner's motion for a certificate of appealability (docket #29) will be denied in its entirety.

Dated: Nov 9, 2000

Douglas W. Hillman
Senior District Judge

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
SOUTHERN DIVISION

BRIAN GARCIA,

Petitioner, Case No. 1:97cv 688
v. Honorable Douglas H. Hillman

CAROL HOWES.
Respondent.

ORDER DENYING MOTION FOR CERTIFICATE OF APPEALABILITY

In accordance with the memorandum opinion filed this date:

IT IS ORDERED that petitioner's motion for a certificate of appealability (docket # 29) be and hereby is DENIED.

Dated: Nov-9 2000

Douglas W. Hillman
Senior District Judge

US District Court ruling, 10/13/00

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN GARCIA.
Petitioner.

Case No. 1:97cv688

-vs-

Hon. Douglas W. Hillman

CAROL HOWES, Warden.
Lakeland Correctional Facility,
Respondent.

OPINION ADOPTING REPORT & RECOMMENDATION

This as a habeas corpus action brought by a Michigan state prisoner, through retained counsel, pursuant to 28 U.S.C. § 2254. The matter presently is before the court on petitioner's objections to the report and recommendation ("R&R") issued by the magistrate judge, recommending that the petition be denied. I carefully have reviewed the comprehensive and thoughtful R&R and the objections filed by petitioner. For the reasons that follow, the R&R is adopted as modified by this opinion and the petition for writ of habeas corpus is denied.

I.

Petitioner Brian Garcia presently is serving a sentence of 20-to-5O years imprisonment following entry of a plea of *nolo contendere* to a charge of second-degree murder. The conviction arose from the death of an eight-month-old child, Shawn Michael Bagarus, with whom plaintiff had been living for two weeks and for whom plaintiff was caring at the time of the infant's death.

On the date of the infant's death, police responded to a call that a baby was not breathing. When they arrived, Shawn Bagarus was lying on the floor, was not breathing and had no pulse. The police performed CPR until the ambulance came, but the child failed to respond and was reported dead upon arrival at the hospital. An autopsy revealed that the infant had suffered blunt force trauma to the back of the head, including multiple cranial fractures on the back and top of the head, severe soft-tissue hemorrhage, cerebral contusions and bilateral retinal hemorrhages.

At the time police arrived at the home, petitioner was the sole person present with the child. Upon questioning, petitioner provided three stories to police. In the last version, petitioner admitted to having repeatedly tried to silence the child by raising his body to a sitting position and pushing or dropping him back to the floor. Specifically, petitioner told police that "instead of laying [Shawn] down gently, just letting him drop back [to the floor]...." He then amplified, saying, "I sat him up, pick him up, he wouldn't stop crying. I sat him down, push him down, I kept on doing that.... Yea, pushed him down, pushed him back. .. . [a]bout 20 times." He also stated that he had twirled the infant around to calm him and accidentally hit the child's head on a table.

II.

A. *Standard of Review*

This court reviews *de novo* those portions of an R&R to which objections are made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The court may accept, reject or modify any or all of the magistrate judge's findings or recommendations. *Id.*

Pursuant to the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). The Sixth Circuit has emphasized that this provision marks a "significant change" and prevents that district court from looking to lower federal court decisions in determining whether the state decision is contrary to, or an unreasonable application of, clearly established federal law. *Harris* v. *Stovall,* 212 F.3d940 940,944(6th Cir. 2000); *Herbert v. Billy,* 160 F.3d 1131, 1134(6th *Cit.* 1998). To justify a grant of habeas corpus relief under this provision of the AEDPA, a federal court must find a violation of law "clearly established" by holdings of the Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision. *Williams v Taylor.* 120 S. Ct. 1495, 1523 (2000). Recently, the Supreme Court held that a decision of the state court is "contrary to" such clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* A state court decision will be deemed an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 1522. Rather, the application must also be "unreasonable." *Id.* Further, the habeas court should not transform the inquiry into a subjective one by inquiring whether all reasonable jurists would agree that the application by the state court was unreasonable. *Id.* at 1522 (disavowing *Drinkadl v.Johnson*, 97 F.3d751, 769 (5th Cir. 1996)). Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams,* 120 S. Ct. at 1522.

Where the state court has not articulated its reasoning, the federal courts are obligated to conduct an independent review to determine if the state court's result is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented. *See Harris,* 212 F.3d at 943. The review remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA. *Id.*

Under the AEDPA, a determination of a factual issue made by a state court is presumed to be correct. 28 U.S.C. §

2254(e)(1). The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Warren v. Smith,,* 161 F.3d 358, 360-61 (6th Ctr. *1998), cert. Denied,* 119 S. Ct. 2403 (1999). The AEDPA requires heightened respect for state factual findings. *Herbert,* 160 F.3d at 1134. The habeas corpus statute has long provided that the factual findings of the state courts, made after a hearing, are entitled to a presumption of correctness. This presumption has always been accorded to findings of state appellate courts, as well as the trial court. *Sec Sumner* v. *Mata, 449* U.S. 539,546(1981); *Smith v. Jago,* 888 F.2d 399 407 n.4 (6th *Cit.* 1989) *cert. denied,* 495 U.S. 961 1990.

B. ***Objections***

Petitioner raises a lengthy series of objections to the magistrate judge's R&R.

First, petitioner objects to a small portion of the magistrate judge's description of the facts. Specifically, at one point in the R&R the magistrate judge characterized petitioner's above-quoted admission that he pushed the child back to the floor from a sitting position approximately twenty to thirty times as an admission that "he had struck the child's head on the ground twenty to thirty times."[4] Petitioner objects to the description as a mischaracterization.

I am persuaded that the magistrate judge's description is not an unreasonable paraphrasing of petitioner's admission.

---

[4] The phrasing was used only in a summary paragraph; when providing more detailed description of the evidence, the magistrate judge accurately recited petitioner's version of his statement.

In any event, whether described as above or as in the R&R, the difference is not material to the analysis of the legal questions.

Second, petitioner objects to the magistrate judge's characterization of his statement as a "confession." Again, the characterization is accurate. The admissions amount to a confession, at least in part. Moreover, whether the statement is described as a "confession" or an "admission" does not affect the legal analysis.

Petitioner's third point of objection amounts to nothing more than a comment that a reasonable trial attorney might have sought to consult an independent physician for an opinion regarding the cause of the injuries and death. Petitioner acknowledges that the comment raises an issue not presented in the petition. The objection therefore is without both substance and merit.

Fourth, petitioner objects to the magistrate judge's observation during the recitation of the procedural history that petitioner failed to object to certain comments of the trial judge. Plaintiff does not dispute the failure to object, but objects to the relevance of that failure under the law. Since the statement is accurate, the magistrate judge did not err in mentioning it, even if the reasoning of the R&R does not ultimately turn on the failure to object.

Fifth, petitioner objects to the magistrate judge's analysis of his claim that his *nolo contendre* plea was involuntary. Petitioner claims that he was coerced into entering the plea by certain comments made by the trial judge during an evidentiary hearing held a week before lie entered his plea. The magistrate judge reasoned, in part, that the state court previously had made a factual finding that petitioner was not coerced by the comments and that, under the AEDPA. state-court factual findings were presumed to he correct. Petitioner objects that a finding that he was not coerced is not a finding of fact, but instead a legal conclusion to which the federal court owes no deference.

As the magistrate judge recognized, while the voluntariness of a plea is a question of law, subsidiary factual findings are questions of fact subject to a presumption of correctness. *See Marshall v. Lonhetger,* 459 U.S. 422, 431-32 (1982). In the instant case, the Michigan Court of Appeals determined that the trial judge's remarks did not coerce petitioner into entering his pica. In reaching this conclusion, the state court, upon review of the record, found that the trial judge's comments were not made to persuade petitioner to enter a plea and that "at no time did the trial judge threaten defendant or reveal an bias a against defendant." The state court's conclusion that petitioner had not been coerced was a secondary factual determination, not a legal conclusion.

I therefore agree with the magistrate judge that the finding is a factual one entitled to a presumption of correctness under the AEDPA. Petitioner has failed to make any showing that would tend to rebut the finding. Instead, petitioner relies solely on the chronology apparent on the record.

Moreover, even if the question of whether petitioner in fact was coerced were deemed a mixed question of law and fact, the petition could only be granted if the state court's determination "was contrary to or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). As the R&R makes abundantly clear, the state court's determination is patently reasonable.

Sixth, petitioner contends that the magistrate judge erroneously concluded that petitioner had the burden of showing voluntariness by clear and convincing evidence.

Petitioner's objection confuses the initial standard for the trial court's acceptance of the plea with the standard of review applicable to habeas corpus actions. The magistrate judge did not hold that petitioner had the initial burden of showing voluntariness in the state court. Instead, he held that under the AEDPA, the state court's factual findings are presumed correct, and petitioner has the burden of rebutting that presumption of correctness by clear and convincing evidence. The magistrate judge properly concluded that petitioner had failed to rebut by clear and convincing evidence the state court findings that the trial judge's comments were not coercive.

Seventh, petitioner objects to the magistrate judge's statement that petitioner presented no evidence in support of his claim that he was coerced by the trial court's earlier comments. Petitioner suggests that his affidavit to the state court of appeals provided some evidence of coercion and that the state court wrongfully denied an evidentiary hearing to further document that coercion. He also contends that coercion is obvious from the timing of the judge's comments and his subsequent decision to plead.

As the magistrate judge noted, however, the affidavit to the state court did not aver that petitioner was coerced by the trial judge's comments. Instead, the affidavit stated only that petitioner's plea was not voluntary because of misrepresentations by defense counsel.

Eighth, petitioner asserts that the magistrate judge failed to consider or distinguish certain cases cited in petitioner's brief. The magistrate judge was not required to cite every case listed in petitioner's brief. He was required only to address every legal issue. I have reviewed the cited cases and the R&R and I conclude that the R&R fully addresses all of the legal claims raised by petitioner.

Petitioner's ninth through eleventh objections relate generally to his contention that the magistrate judge erred in concluding that the state court's finding that he was not coerced was not unreasonable. I disagree. The state court's finding that the timing did not suggest coercion was an entirely reasonable conclusion from both the record and the context in which the trial court statements were made. Further, at the time of his plea, petitioner expressly represented under oath that no one had made threats or promises to get him to plead *nolo xontendere.* Petitioner has failed to provide any evidence, much less clear and convincing evidence, to rebut the presumption that the state court's factual finding was correct.

As a result, the state court determination is neither unreasonable nor rebutted by clear and convincing evidence. Accordingly, whether the conclusion is viewed as a finding of fact or a mixed question of fact and law, petitioner is not entitled to habeas relief under the AEDPA.

Twelfth, petitioner argues that the magistrate judge erred in concluding that his second issue was not exhausted. I disagree.

In his state appellate brief, petitioner argued only that the trial judge had violated Michigan statutory and decisional law by failing to a rise him of the elements of the offense for which he was charged. At no time did petitioner raise a federal constitutional claim.

Petitioner argues, however that in the final paragraph of' his argument in his appellate brief on this issue, he cited a federal case that addressed the voluntariness of a plea. The citation, however, was directed to petitioner's argument that he should be entitled to an evidentiary hearing. In the context of the paragraph in which it was raised, the citation was not used to support a federal constitutional claim and does not itself sufficiently raise such a claim.

In addition, while it unquestionably is true that certain of the state-law cases cited by petitioner in his appellate brief also cited federal case law, petitioner's theory in the court of appeals was directed solely to the argument that the trial court failed to comply with state law. I am persuaded that the citations, inasmuch as they were used to support different issues, were insufficient to fairly present his federal constitutional claim. *See Lyons v. Stovail,* 188 F.3d 327,331-32 (6th Cir. 1999)(comity requires that the state court have had the opportunity to consider the same claim resting on the same basis as that argued in federal court). As a consequence, the magistrate judge properly concluded that the issue was not exhausted.

In any event, the magistrate judge's conclusion regarding exhaustion was not dispositive. Instead, because the issue was patently groundless, the magistrate judge addressed the merits of petitioner's claim rather than requiring state-court exhaustion of frivolous claims. *See Lyons,* 188 F.3d at 333; *Cain v. Redman,* 947 F.2d 817, 820 (6th Cir. 1991) (federal courts authorized to reach substance of meritless, unexhausted claims). Accordingly, the finding that petitioner failed to exhaust his claim in state court amounts only to an alternative holding.

In his thirteenth and fourteenth objections, petitioner challenges the magistrate judge's analysis of the merits of the claim. Petitioner contends that his plea was not voluntary because the state cowl failed to advise him of the elements of second degree murder and he was unaware that the intent to kill was a necessary clement.

Because the state court of appeals was not asked to address this constitutional claim, the federal court is unable to assess whether the state court's analysis was contrary to or amounted to an unreasonable application of clearly established federal law. In such cases, the Sixth Circuit has directed the court to determine whether the actual decision or result of the state court is consistent with federal law. "[W]here the state court has not articulated its reasoning, federal courts are obligated to conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented." *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000). That independent review is not a hill, de novo review of the claims, "but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Id.*

Applying the *Harris* standard, the magistrate judge concluded that the state-court refusal to allow petitioner to withdraw his plea did not amount to an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. I have reviewed with care the magistrate judge's reasoning and find it to be without error. Accordingly, I reject petitioner's objections to the magistrate judge's treatment of his second habeas claim and adopt the reasoning of the R&R.

Fifteenth, petitioner argues that the magistrate judge incorrectly concluded that he had failed to exhaust in state court his claim that trial counsel was ineffective for failing to move to suppress petitioners statement to police. Petitioner contends that in his supplemental brief on appeal, he clearly raised the question whether Officer Dings impermissibly coerced his confession by failing to allow him to use the telephone until he had answered Ding's questions.

I am persuaded that the issue was exhausted in the state courts. Although the title of petitioner's supplemental claim on appeal purported to challenge the voluntariness of his waiver of Miranda rights, the substance of petitioner's claim was the voluntariness of the statement itself. Petitioner relied on Michigan cases discussing the federal constitutional principles governing the voluntariness of statements, not the voluntariness of the *Miranda* waiver, I therefore conclude that petitioner adequately raised his third claim for habeas relief in his supplemental brief on appeal to the Michigan Court of Appeals. Accordingly, the R&R is modified to eliminate any alternative reliance on the failure to exhaust.

In his sixteenth objection, petitioner asserts that the magistrate judge also erred in concluding that petitioner was not entitled to an evidentiary hearing because he failed to seek remand for such hearing in the state courts. Petitioner contends that in the conclusion and prayer for relief in his supplemental appellate brief, he squarely requested a remand for an evidentiary hearing on his claim that trial counsel was ineffective.

I agree, Petitioner unquestionably requested a remand for an evidentiary hearing. The R&R therefore is modified to exclude reliance on the failure to request an evidentiary hearing.

Nevertheless, I find no error in the magistrate judge's refusal to grant an evidentiary hearing on this habeas claim. In deciding the issue without evidentiary hearing, the Michigan Court of Appeals accepted as true petitioner's contention that lie was denied permission to use the telephone until after he answered the officer s questions. The court held that even if true, the allegation would not invalidate the confession. As a result, the court held that counsel was not ineffective in failing to request a *Walker* hearing.

Petitioner has proffered no additional facts to be proved in an evidentiary hearing other than those accepted as true by the Michigan Court of Appeals. I therefore decline to permit an evidentiary hearing as no issues remain which would be clarified by such hearing. Instead, the sole issue is the reasonableness of the state-court determination that trial counsel was not ineffective for failing to request a *Walker* hearing.

That issue constitutes the substance of petitioner's final objection. Petitioner contends that the state courts determination that counsel was not ineffective was unreasonable. Petitioner's objection substantially reiterates the argument in his petition and original brief.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must establish (l) that counsel's performance fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. *Strtckland* ***v. Washington,*** 466 U.S. 668, 687-88 (1984). Both prongs of the *Strickland* test involve mixed questions of law and fact. *Id.* at 698. Under the AEDPA. a federal court may not disturb a state court's application of law to facts unless the state court's determinations involve an unreasonable application of clearly established law as determined by the Supreme Court. See 28 § 2254(D)(1).

I have reviewed the analysis of petitioner's claim and find no error in the magistrate judge's application of either prong of the ***Strickland*** standard. Counsel did not act unreasonably in failing to move for suppression of petitioner's statement. Further, even had counsel moved to suppress, that motion clearly would have been unsuccessful. Accordingly, the magistrate judge's analysis of this issue is adopted as the opinion of this count.

For the foregoing reasons, the report and recommendation of the magistrate judge is **ADOPTED AS MODIFIED** by this opinion. The petition for habeas corpus is **DENIED.**

Dated: Oct 13, 2000

Douglas W. Hillman
Senior District Judge

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN GARCIA,)
)
Petitioner,) Case No. 1:97cv 688
) Honorable
v.) Douglas W. Hillman
)
CAROL HOWES,)
) **REPORT AND**
Respondent.) **RECOMMENDATION**
)

This is a habeas corpus action brought by a state prisoner, through retained counsel, pursuant to 28 U.S.C. § 2254. Petitioner is serving a sentence of 20-to-50 years imprisonment, imposed by the Berrien County Circuit Court on April 11, 1994, after petitioner entered a plea of *nolo contendere* to a charge of second-degree murder, MICH. COMP. LAWS § 750.317. After an unsuccessful direct appeal, petitioner brings this habeas corpus action through counsel uninvolved in the state-court proceedings. Petitioner filed his habeas application on August 18, 1997, and the Antiterrorism and Effective Death Penalty Act, PUB. L. 104-132, 110 STAT. 1214 ("AEDPA"), therefore applies to his action. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir.), *cert. denied*, 522 U.S. 1112 (1998).

Counsel's petition and supporting brief raise three habeas corpus claims. First, petitioner claims that his plea of *nolo contendere* was rendered involuntary by alleged threats made by the trial court during a motion hearing conducted three days before the change of plea. Second, petitioner contends that his plea of *nolo contendere* was rendered constitutionally invalid by the failure of the trial judge to explain the elements of second-degree murder, and especially the *mens rea* element. Third, petitioner contends that his trial counsel was ineffective for failure to move to suppress petitioner's statement to police on grounds of involuntariness, arising from officers' refusal to allow petitioner to use a telephone during interrogation. On the last issue, petitioner's counsel seeks an evidentiary hearing to establish the involuntariness of petitioner's statement to police and the subsequent ineffective conduct of trial counsel. Respondent has filed an answer to the petition, supported by relevant portions of the state-court record. Upon review of the record under AEDPA standards, I find that petitioner is not entitled to an evidentiary hearing in this court and that he has not established entitlement to habeas corpus relief. I therefore recommend that the petition be denied on its merits.

Proposed Findings of Fact

A. Trial-Court Proceedings

The state-court prosecution arose from the death of Shawn Michael Bagarus, the eight-month-old child of petitioner's 19-year old girlfriend, Courtney Shay Clark, with whom petitioner had been living for about two weeks. At approximately 9:30 in the morning of January 12, 1994, the Berrien County Sheriff's Department put out an alert in response to a 911 call reporting that a baby was not breathing. City police officers responded to 808 W. Front St., Apt. 25, in the City of Buchanan, and found an infant lying on the floor on its back. Petitioner was the only other person present in the apartment. Although the child was not breathing and had no pulse, officers administered CPR until the ambulance arrived. The child was taken to Pawating Hospital in Niles, Michigan, where he was pronounced dead.

Officer Robert Dings asked petitioner what happened. Petitioner said that the child had been having trouble breathing that morning and that he eventually found the child on the floor not breathing. When CPR was unsuccessful, petitioner called 911.

After further background questioning at the apartment, the officer left. Later that day, the officer spoke to Dr. Landgraf, who told him that the child had died and that it appeared to the doctor to be a homicide. The officer then picked up petitioner and brought him to the police station for further questioning. After signing a waiver of *Miranda* rights, petitioner gave three separate stories to the officer, finally conceding that he had struck the child's head on the ground twenty to thirty times. Petitioner was charged with second-degree murder. MICH. COMP. LAWS § 750.317.

Petitioner appeared for a preliminary examination in the 5th District Court on January 25, 1994, accompanied by James K. Jesse, appointed counsel. The principal evidence presented by the prosecutor consisted of an autopsy report and the testimony of Officer Dings. The autopsy report (found in petitioner's Appendix, docket # 1, item 5) reflected that the cause of death was blunt-force trauma to the occiput (back of the head). The final autopsy findings noted multiple commuted cranial fractures of the occiput, a linear fracture of the left parietal plate (the bone at the top of the skull), severe soft-tissue hemorrhage, cerebral contusions, and bilateral retinal hemorrhages. The autopsy report showed that the fracture at the back of the head was depressed and that loose bone fragments were present.

The testimony of Officer Dings principally related to petitioner's confession. The officer first testified concerning petitioner's statement on the morning of January 12 in the apartment, during which he told the officer that he found that the child was not breathing and began to do CPR. (*See* Preliminary Examination (PE) Transcript, docket # 12, at 12-13). Later in the day, the officer brought petitioner to the police station for further questioning, after the doctor advised that the death was a homicide in his opinion. The officer read *Miranda* warnings to petitioner from a card, petitioner responded that he understood his rights, and he signed the card so certifying. (PE, 16-18). Petitioner told the officer that he and Courtney had moved in together on December 31, 1993, and that the morning of January 12, 1994, was the first day that petitioner had been left alone for any extended period of time with the baby. (PE, 18-19). During the ensuing interview, petitioner gave the officer "three different stories as to what happened to Shawn and how he got the injuries that he got." (PE, 18).

Petitioner's first version of events was that he bathed and fed the child in the morning, but that the child was whimpering and fussing and was having difficulty breathing at various times. (PE, 19-20). The officer told petitioner that he did not believe that he was telling the whole truth. Petitioner then gave a second version of events, in which he repeated the same series of events but included the fact that he had been playing with the child, holding him by his legs with the child facing towards him. Petitioner told the officer that he raised the child in the air, spun around with the child raised above his head, and when he stopped he accidentally struck the back of the child's head on a coffee table in the living room area. (PE, 20). The child ultimately stopped breathing. Petitioner pounded on the child's chest and stomach in an effort to do CPR and then called 911. (PE, 21-22).

The officer then confronted petitioner with the doctor's opinion that the death was a homicide. Petitioner then told a third version of what occurred. He said he awakened the child, fed him and then ran water for a bath. After the bath, he took the child into the living room, where he held the child and spun him around. As he lowered the baby down, the baby's head struck the floor. Petitioner laid the baby on the floor and attempted to quiet him by giving him a pacifier. The baby spit the pacifier out and continued to cry. Petitioner was angry because the baby would not stop crying. The officer then testified as follows:

> Q Did he tell you what, if anything, he did as a result of this anger?
>
> A Yes. He told me that during -- after he laid the child down on the floor during the crying that he estimated that he lifted the child to a sitting position or lifted the child completely off the floor approximately 20 to 30 times in an effort to get him to stop crying, putting the pacifier in. The baby would spit it out from the crying and that he would then put the baby back down on the floor with some degree of force.

(PE, 23).

Petitioner eventually admitted to the officer that when the child would not stop crying, petitioner took the palm of his hand and hit the child in the forehead area, which caused the child to fall backwards and strike the back of his head on the floor. The child continued to cry. Petitioner then grasped the child under his arms and brought him up to a seated position. "Mr. Garcia would take the child and then bring it down to the floor. And this occurred, in his estimation, twenty to thirty times." (PE, 26). "He told me that during this time that he was continuing doing this motion of striking the baby's head against the floor that he noticed that the baby would stop breathing." (PE, 26). Petitioner told the officer that he continued to strike the child's head against the ground at least twice more while the child's eyes rolled back. (PE, 26). When petitioner touched the back of the baby's head, he felt that it was soft and realized the baby was hurt, but did not know how badly. (PE, 27).

On cross-examination by defense counsel, it was established that the interrogation was tape-recorded, except for a period in the middle during which the tape ran out. Defense counsel marked a copy of the transcript as an exhibit and cross-examined Officer Dings with the aid of the transcript.[5] During cross-examination, defense counsel established that the officer had been aggressive in his questioning, telling petitioner more than once that he knew that petitioner was lying. (PE, 35-36). The officer also told petitioner that his first story was not consistent with the facts as reported by the doctor. (PE, 36, 41). Defense counsel did not ask whether petitioner requested access to a telephone at any time during the interrogation.

---

[5] The transcript of the taped interrogation is attached to petitioner's reply brief (docket # 21).

At the conclusion of the preliminary examination, the district judge bound petitioner over to circuit court. Petitioner was remanded to jail, as he was unable to make the high cash bond.

Approximately one week after the preliminary examination, defense counsel sent petitioner a letter pointing out to him that he was in "a very serious situation." Counsel informed petitioner that he was facing a maximum sentence of life in prison or any term of years and was "going to have a difficult time in defending this action." Counsel pointed out that petitioner made three different statements, the third being the most damaging to his case. Counsel also explained the damaging effect to petitioner's credibility caused by his first two, apparently false statements. "However, the fact that you apparently did not tell the truth [in] the first two statements weakens your claim that the child's death was an accident." Counsel advised that the case would be set for trial within the next three or four months and that he would work with petitioner to prepare a defense. (Letter of James Jesse dated January 31, 1994, found in Supreme Court Record, docket # 17).

On April 4, 1994, petitioner and counsel appeared before the circuit court for purposes of entering a plea of *nolo contendere* to the charge of second-degree murder, pursuant to a sentencing agreement. (*See* Rearraignment Transcript (RT), docket # 13). The court then began a colloquy designed to determine the knowing and voluntary nature of the plea. The court informed petitioner of the nature of the offense as follows:

> The charge against you is that on the date of January 12, 1994, at 808 West Front Street,

> Number 25, City of Buchanan, Berrien County, Michigan, that you did with intent to kill, to do great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of said act would cause death or great bodily harm, kill and murder one Shawn Michael Bagarus, B-A-G-A-R-U-S, said act committed without premeditation or deliberation, contrary to statute.
>
> Do you understand that charge?
>
> THE DEFENDANT: Yes.
>
> THE COURT: That's commonly called second degree murder.
>
> The maximum possible prison sentence for this is imprisonment for life or any term of years.
>
> Do you understand that?
>
> THE DEFENDANT: Yes.

(RT, 4-5). Petitioner informed the court that he wished to plead no contest to the charge. A discussion ensued concerning the rights that petitioner would give up by the entry of the plea. In the middle of this colloquy, defense counsel informed the court that petitioner did not want to pursue the plea further. (RT, 7). In response to the court's question, petitioner said that he was sure. The court advised petitioner several times that he had an "absolute right to a trial" and that the decision was completely his. (RT, 7-8). The court called a fifteen-minute recess to allow petitioner to discuss the matter further with counsel. Afterwards, petitioner stated, "I decided to go for trial." (RT, 10). At no point during these proceedings did the court express any impatience with petitioner or attempt to pressure him in any way. To the contrary, the court emphasized that the decision was petitioner's alone.

Two days later, on April 6, 1994, defense counsel wrote a letter to petitioner's mother enclosing documents that she had requested. A copy of the letter was sent to petitioner as well. In the letter, counsel again emphasized that petitioner was "in a very difficult position," because the forensic evidence did not support petitioner's claim of accident. Referring to Dr. Landgraf, the physician who performed the autopsy, Mr. Jesse stated: "He indicated quite clearly that he felt there was no way the injury to the child which caused the death could have been caused in the manner described by your son. He explained to me why it could not occurred [sic] that way." Counsel strongly recommended that petitioner consider a no-contest plea pursuant to the plea agreement. He stated that the prosecutor "would not consider manslaughter" but would enter into a sentencing agreement in exchange for a plea of guilty to second-degree murder. (Record, docket # 17).

On April 8, 1994, the circuit court conducted a hearing on the prosecutor's motion for leave to admit evidence of prior bad acts pursuant to Rule 404(b) of the Michigan Rules of Evidence. The motion was necessitated by the then-recent opinion of the Michigan Supreme Court in *People v. Vandervliet*, 508 N.W.2d 114 (Mich. 1993). The *Vandervliet* decision was devoted to the question of admissibility of evidence of prior bad acts under Rule 404(b) and contained an extensive discussion of the circumstances in which such evidence is admissible. In that case, the court adopted a modification of Rule 404(b), imposing a requirement upon the prosecution to give pretrial notice of its intent to introduce such evidence at trial. 508 N.W.2d at 132. The court further emphasized that "no judge can be expected to correctly assess the evidentiary issue unless and until the court is presented with a concrete theory of defense that allows the court to determine relevancy." Consequently, the court further authorized the trial judge to require the defendant to articulate his theory or theories of defense. *Id.* at 132-33. The circuit judge expressly stated that the *Vandervliet* decision would govern the question whether the proffered evidence of a prior bad act -- petitioner's alleged slapping of one of his children -- would be admissible in the murder prosecution. (*See* Motion Transcript (MT), docket # 14). The court indicated that the admissibility of the previous incident would be influenced by the theory of defense. During colloquy with the assistant prosecutor, the court made the following comment, which petitioner now claims coerced him into entering a subsequent plea of *nolo contendere*.

> THE COURT: And if the jury buys the version of the defendant's - what it is - third or fourth statement - whichever particular one - about bashing the kid's head 20 or 30 times, they're not only likely to find him guilty, they're likely to be ready to storm out of the jury box and lynch him right here.

> Now, the prosecutor has given pre-trial notice of its intent to introduce the other acts. They've done that well and fine.
>
> And it also says that in the rule that is adopted today - a rule, by the way, which I have yet to see. Anyone else have any information on that? They said they were adopting that back in September of '93, but it hasn't gotten through the mail yet. That the Court is to require the defendant to articulate his theory or theories of defense.
>
> And so following the decision of the case, what's going to be at issue here? What's going to be the theory of the defense so we know whether or not this matter is material?
>
> In order to find relevance, we have to find materiality. And this is apparently the only place in the rules where we still pay some attention to materiality.
>
> Go ahead.

(MT, 12-13). Defense counsel did not object to the court's statement or in any other way indicate that he believed it was intended to coerce his client. Rather, defense counsel articulated his theory of accident. After other colloquy, the court stated that if the defendant were "claiming accident, I'm afraid you're opening the door to the prosecutor because the prosecutor is allowed to bring in evidence that this isn't an accident." (MT, 16). The court therefore expressed its tentative decision to overrule an objection under Rule 404(b), but predicted that the evidence would be inadmissible under the doctrine of spousal immunity, as petitioner's wife was the source of the testimony. (MT, 16).

On April 11, 1994, petitioner and counsel again appeared before the circuit court for purposes of entering a no-contest plea to a charge of second-degree murder. (*See* Transcript of No-Contest Plea (NCP), docket # 15). Defense counsel opened the proceedings by informing the court that petitioner had changed his mind and that he wished to go ahead with the no-contest plea. Counsel stated: "We went through all the allegations and factors of this offense and we are ready to proceed." (NCP, 2-3). The court then conducted a plea colloquy. Rather than reading all the elements of the offense to petitioner, as the court had done seven days earlier, the court stated that the charge "is commonly called murder in the second degree." (NCP, 3). The court then reviewed the penalties that petitioner faced and the rights that he would give up by pleading no contest. (NCP, 3-6). The assistant prosecutor set forth the terms of the plea agreement, which consisted of a binding provision that petitioner be sentenced within the bottom two-thirds of the guideline range. The court and the parties all agreed that this provision required that the minimum sentence could not exceed twenty years. (NCP, 6-7). After acknowledging his understanding of the agreement, petitioner informed the court that it was his own choice to plead *nolo contendere.* (NCP, 8). The court then relied upon the autopsy report and the preliminary examination transcript in finding a sufficient factual basis for a plea of no-contest to second-degree murder. At the end of the proceedings, the court found defendant's plea to be "understanding, voluntary and accurate." (NCP, 10).

The court sentenced petitioner on May 16, 1994. (*See* Sentencing Transcript (ST), docket # 16). During defense counsel's allocution, he made the following statement:

> Third, I think it's important for the Court to know that Mr. Garcia and I talked several times about this case, and Mr. Garcia all along had a great deal of problems dealing with the fact that he committed this offense and why it happened. And I'm not sure he can tell you to this day exactly what all happened or the total reasons about why it happened. However, the Friday before he offered his plea before the Court, he and I talked, and he indicated that's what he want to do. He didn't want to put the victim's family through any more, he didn't want to put himself through anything more, and behind all that was the fact that I think at that point he'd decided to write--or, contact the press and let them know as well some of the things that had been said over the period of time this case had been going on. And he contacted Lisa Cripp from the South Bend Tribune, and I wasn't even aware he'd done that until after the plea was offered and accepted that Monday morning when I arrived home and read the paper and there are my client's comments in the paper.

(ST, 5-6). Counsel indicated that petitioner had "a great deal of remorse" and asked for leniency. (ST, 6).

Before requesting petitioner's allocution, the sentencing judge informed him that he would indeed follow the plea bargain and impose a minimum sentence of not more than twenty years. (ST, 8-9). Petitioner then made a statement, claiming that the baby's death was "an accident caused by my carelessness and rough play. If I was aware that what I was doing was going to hurt Shawn, I wouldn't have done it." Petitioner apologized to his former girlfriend and her family, again claiming that his act was not intentional and that he never meant to hurt the child. (ST, 6).

The court then imposed a sentence of 20-to-50 years. In imposing sentence, the court remarked that the murder was not deliberate or premeditated, but seemed to fit a pattern in child homicides by live-in boyfriends. (ST, 10-12).

Petitioner, represented by new appointed counsel, appealed as of right to the Michigan Court of Appeals. Appellate counsel's first action was to file a motion for remand to the circuit court for the sole purpose of withdrawing the no-contest plea. The asserted grounds for the motion were: (1) the court failed to advise defendant of the nature and elements of the offense; (2) the court failed to advise the defendant of the full meaning of the right to compulsory process and of his right against self-incrimination. The motion also argued that the preliminary examination transcript and autopsy report were insufficient to establish all the elements of second-degree murder. The motion recited that the defendant believed that he had a valid defense to the charge and that he wished to proceed to trial. (Defendant's Motion to Remand, found in Court of Appeals Record, docket # 18). At no point in the motion did counsel raise a claim of ineffective assistance of counsel or seek a remand for a hearing on this question. By order entered February 6, 1995, the Court of Appeals denied the motion to remand "for failure to persuade the Court of the necessity of a remand at this time."

Petitioner's appellate counsel filed his appellate brief on March 29, 1995. The appellate brief raised the following issues for review:

I. The trial court committed an abuse of discretion and erred in accepting defendant's plea of no-contest.

II. The trial court abused its discretion in imposing sentence upon the defendant.

In support of the first ground, counsel argued that the trial judge failed adequately to explain the nature of the charge to petitioner. In making this argument, counsel cited only state-court rules and appellate decisions and did not raise any federal principle or case. Counsel further argued that the trial judge had failed adequately to explain the full meaning of the right to compulsory process and the right against self-incrimination. (Brief of Appellant, found in Court of Appeals Record, docket # 18).

The Berrien County prosecutor filed his responsive brief on August 9, 1995. Thereafter, on October 20, 1995, petitioner filed a *pro se* "supplemental brief" with the help of a prison paralegal. The supplemental brief raised for the first time a claim of ineffective assistance of counsel. In support of his claim, petitioner's *pro se* brief argued that trial counsel was ineffective for failure to request an evidentiary hearing to determine the voluntariness of petitioner's waiver of his *Miranda* rights. He also claimed that counsel was ineffective for pressuring him to plead no-contest to the offense, at a time when petitioner was maintaining his innocence. Further, petitioner charges counsel with ineffectiveness for making a promise of leniency to him and for failure to investigate petitioner's mental condition. Petitioner's second principal argument was that his plea of *nolo contendere* was rendered involuntary by threats and coercion, including the statement by the trial judge at the motion hearing that the jury might "storm out of the jury box and lynch him right here." Petitioner's third *pro se* argument was a challenge to his sentence under the Equal Protection Clause of the Fourteenth Amendment. At no point did petitioner seek a remand to the trial court for an evidentiary hearing on any of these issues, including the claims of ineffective assistance of trial counsel.

On November 28, 1995, a panel of the Michigan Court of Appeals issued a *per curiam* opinion affirming both the conviction and the sentence. The court's opinion addressed all issues raised by petitioner and his counsel. With regard to petitioner's challenge to the adequacy of the trial judge's description of the offense under state law, the Michigan Court of Appeals ruled as follows:

> Defendant first argues that the trial court improperly accepted defendant's nolo contendere plea. We disagree. MCR 6.302(A) states that the court may not accept a plea of nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Our review of the record shows that defendant's plea was understanding, voluntary, and accurate. The trial court strictly followed MCR 6.302 to ensure that defendant's plea was understandingly, voluntarily, and accurately given. Defendant concedes that the trial judge named the offense to which he was pleading, but defendant asserts that the trial court failed to inform him of the basic elements of the offense, thereby failing to inform him as to the nature of the

> charge. This argument is without merit. MCR 6.302(B)(1) specifically states that "the court is not obliged to explain the elements of the offense. . . ." Furthermore, in Guilty Plea Cases, 395 Mich 96, 116; 235 NW2d 132 (1975), our Supreme Court stated that "it would be unrealistic to impose on the judge the obligation to impart to a defendant the substantive law applicable to his case."

(Op., 1, found in Court of Appeals Record, docket # 18).

The court addressed all claims of ineffective assistance of counsel, including the claim that counsel was ineffective for failure to request an evidentiary hearing (called a "*Walker* hearing" in Michigan practice) concerning the voluntariness of petitioner's *Miranda* waiver. *See Machacek v. Hoffbauer*, No. 98-1815, ___ F.3d ___, 2000 WL 680242, at * 7 n.3 (6th Cir. May 26, 2000) (citing *People v. Walker*, 132 N.W.2d 87 (Mich. 1965)). The Court of Appeals ruled:

> Defendant also argues that he was denied effective assistance of counsel. Defendant first claims that defense counsel was ineffective for failing to request a Walker hearing. Assuming arguendo that Police Officer Dings told defendant that he could use the phone to call his family after he "answer[ed the officer's] questions," we do not believe that this alleged statement by Dings equates to a promise of leniency that reasonably induced defendant to confess. See People v Butler, 193 Mich App 63, 69; 483 NW2d 430 (1992). There was no claim that defendant had to confess in order to use the

> phone to call his family. Therefore, defense counsel was not ineffective in failing to request a Walker hearing.

(Op., 2). With regard to petitioner's claim that he was coerced by the statements of the trial judge, the Michigan Court of Appeals held as follows:

> Next, defendant argues that he was coerced into pleading nolo contendere. The record does not support defendant's assertion. Although defendant states that the trial judge made comments in order to persuade defendant to enter a plea, we do not find this to be the case. While defendant is correct that the trial judge made several comments at a motion hearing, the comments were made in the context of whether to admit certain evidence at trial and whether additional security would be needed in the courtroom because of a threat made against defendant's life by one of the victim's relatives. Contrary to defendant's assertion, at no time did the trial judge threaten defendant or reveal any bias against defendant. Thus, the cases on which defendant relies are inapplicable in this case. As to defendant's assertions that his attorney coerced him into pleading nolo contendere, the record does not support defendant's argument.

(Op., 3). The appellate court likewise rejected all other appellate issues and affirmed the judgment of the trial court.

On January 16, 1996, petitioner filed a *pro se* application for leave to appeal to the Michigan Supreme Court. The application was supported by the same *pro se* supplemental brief submitted to the Michigan Court of Appeals. By form order entered August 30, 1996, the Michigan Supreme Court denied leave to appeal.

On August 18, 1997, within the one-year period allowed by AEDPA, petitioner filed the present habeas corpus action. The habeas corpus petition and supporting materials were drafted by counsel who was uninvolved in the state proceeding. The habeas corpus petition asserts that the *nolo contendere* plea was involuntary because of threats and coercion by the judge, that the plea was unknowing because the trial judge had not adequately explained the elements of the offense and that trial counsel was ineffective for failure to move to suppress petitioner's statement to the police.

Discussion

I. AEDPA Standard

Pursuant to the AEDPA, an application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

The AEDPA limits the source of law to eases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). The Sixth Circuit has emphasized that this provision marks a "significant change" and prevents the district court from looking to lower federal court decisions in determining whether the state decision is contrary to, or an unreasonably application of, clearly established federal law. *Harris v. Stovall,* No. 98-2308, ___ F.3d ___ 2000 WL 634994, at *3 (6th Cir. May 18, 2000); *Herbert v. Billy*, 160 Rid 1131, 1131 (6th Cir. 1998). To justify a grant of habeas corpus relief under this provision of the AEDPA, a federal court must find a violation of law "clearly established" by holdings of the Supreme Court, as opposed to its dicta, as of the time of the relevant state court decision. *Williams v. Taylor*, 120 S. Ct. 1495, 1523 (2000). Recently, the Supreme Court held that a decision of the state court is "contrary to" such clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a cases differently than this Court has on a set of materially indistinguishable facts." *Id.* A state court decision will be deemed an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 1522. Rather, the application must also be "unreasonable." *Id.* Further, the habeas court should not transform the inquiry into a subjective one by inquiring whether all reasonable jurists would agree that the application by the state court was unreasonable. *Id.* at 1522 (disavowing *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)). Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Williams*, 120 S. Ct. at 1522.

Under the AEDPA, a determination of a factual issue made by a state court is presumed to be correct. 28 U.S.C. § 2254(e)(1). The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998), *cert denied*, 119 S.Ct. 2403 (1999). The AEDPA requires heightened respect for state factual findings. *Herbert*, 160 F.3d at 1134. The habeas corpus statute has long provided that the factual findings of the state courts, made after a hearing, are entitled to a presumption of correctness. This presumption has always been accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 339, 407 n.4 (6th Cir. 1989), *cert denied*, 495 U.S. 961 (1990). Applying the foregoing standards under the AEDPA, I find that petitioner is not entitled to relief.

II. Involuntariness of Plea

The habeas corpus petition contends that petitioner's plea of *nolo contendere* was coerced by statements of the trial judge made the previous week during a motion on an evidentiary matter. The trial judge's statements came in the course of his attempts to ascertain the theory of petitioner's defense. Such an inquiry had been sanctioned by the then-recent Michigan Supreme Court decision in *People v. Vandervliet*, 508 N.W.2d 114 (Mich. 1993). The evidentiary issue arose because the prosecutor sought to introduce the testimony of petitioner's wife to the effect that petitioner had once slapped one of his children, leaving a mark on her face. Under *Vandervliet*, the inquiry into the nature of petitioner's defense was essential. If petitioner was claiming that he did not cause the baby's death, proffered evidence would have been inadmissible, because its only possible effect would have been to support an inference that petitioner is the kind of person who would hurt a child. By contrast, if petitioner was admitting that he caused the child's injury but was asserting a defense of accident, then the previous incident would have been relevant to rebut this contention. Without a concrete presentation of the theory of defe[illegible] the trial judge would have been required to assume the relevancy of the other acts evidence proffered by the prosecution. *See Vandervliet*, 508 N.W.2d at 132. In the course of review with the assistant prosecutor the various theories of defense contained in petitioner's statement to Officer Dings, the trial judge made the comments (reproduced at p. 9 of this Report and Recommendation) that petitioner now claims coerced him into pleading *nolo contendere*. As noted above, trial counsel did not object to the statements, nor did appellate counsel claim that the statements were coercive. Rather, petitioner's own supplemental brief, filed *pro se* with the help of a prison paralegal, raised the issue for the first time in the state courts.

The constitutional validity of a plea of guilty or *nolo contendere* entered in the state courts is to be judged under the due-process standard set forth by the United States Supreme Court in *Boykin v. Alabama*, 395 U.S. 238 (1969). Under *Boykin*, a guilty plea must be knowing and voluntary in order to withstand scrutiny under the Due Process Clause. A criminal defendant enters a guilty plea knowingly when he understands the nature of the charge and the "direct consequences" of his plea. *See Brady v. United States*, 397 U.S. 742, 748 (1970). In general, a plea is voluntary if it is not the result of force, threats, or promises apart from those disclosed to the court in a plea agreement. *See Brady*, 397

U.S. at 750. In the present case, petitioner asserts that the statements of the trial judge made on April 4 rendered petitioner's April 11 plea of *nolo contendere* involuntary, because they had the effect of threatening or coercing petitioner into relinquishing his constitutional right to a trial. Several well-established doctrines of habeas corpus jurisprudence prevent the court from accepting this proposition.

First, the Michigan Court of Appeals has already found as a fact that the trial judge's comments to the prosecutor, made a week before the *nolo contendere* plea, did not coerce petitioner into entering his subsequent plea. The question whether a plea of guilty or *nolo contendere* is voluntary for purposes of the federal Constitution is a question of federal law. But the subsidiary factual questions, such as whether the statement of the trial court actually coerced defendant by overbearing his will are questions of fact subject to the presumption of correctness established in 28 U.S.C. § 2254. This principle was established by the Supreme Court in *Marshall v. Lonberger*, 459 U.S. 422 (1982). *Lonberger* was a federal habeas corpus proceeding to review a death penalty conviction in the Ohio state courts. In support of its request for the death penalty, the state had introduced into evidence of a previous Illinois conviction as an aggravating circumstance. After an evidentiary hearing, the Ohio courts found that the Illinois conviction was supported by a knowing and voluntary guilty plea. The Sixth Circuit, upon review of the record, found that the plea was not voluntary, because the defendant was not aware of the nature of the charge to which he was pleading. On *certiorari* review, the Supreme Court reaffirmed that the question whether a plea of guilty is voluntary is a question of federal law, but that "questions of historical fact" supporting that conclusion are subject to the presumption of correctness under section 2254. The Court reversed the Sixth Circuit, finding that the Sixth Circuit had not accorded due deference to the state-court findings of underlying fact, as required by section 2254.

Since the time of *Marshall v. Lonberger*, section 2254 has been amended to accord even greater deference to the factual findings of the state courts. Under AEDPA, a determination of a factual issue made by a state court is presumed to be correct. 28 U.S.C. § 2254(e)(1). Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.* Factual findings by state appellate courts, as well as trial courts, are subject to this deference. *See Sumner*, 449 U.S. at 546. In the present case, the Michigan Court of Appeals reviewed the record and found (1) that the trial judge's comments were not made in order to persuade defendant to enter a plea and (2) that "at no time did the trial judge threaten defendant or reveal any bias against defendant." (Op., 3). Pursuant to the provisions of AEDPA, these factual findings are binding upon this habeas court, unless rebutted by clear and convincing evidence.

Petitioner has presented no evidence, let alone clear and convincing evidence, in support of his claim. Significantly, petitioner filed a handwritten affidavit in the Michigan Court of Appeals, in which he made several assertions designed to undermine the voluntariness of his plea, including the contention that the plea was based upon a sentencing promise by defense counsel. Nowhere in his affidavit did petitioner contend that his guilty plea was the result of coercion by the trial judge. To be sure, the trial judge made certain statements a week before defendant entered his plea. That fact is beyond dispute. What is missing in the present case is evidence of cause and effect between the statements and the subsequent *nolo contendere* plea. Petitioner apparently wishes this court to speculate on the question of causation or to hold, as a matter of law, that the trial court's comments must have coerced defendant into pleading *nolo contendere*. Neither option is open to a habeas court. In light of the factual findings of the Michigan Court of Appeals, petitioner was required to produce clear and convincing evidence that he was in fact induced to plead *nolo contendere* by the court's previous comments. Petitioner has failed to do so.

A second obstacle to petitioner's claim is erected by the proceedings at the plea hearing, including petitioner's own answers given under oath. When a state defendant brings a federal habeas petition challenging the voluntariness of his plea, the state generally satisfies its burden of showing a voluntary and intelligent plea by producing a transcript of the state-court proceeding. *Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). Where the transcript is adequate to show that the plea was voluntary and intelligent, a presumption of correctness attaches to the state-court findings of fact and to the judgment itself. *Id.* A satisfactory state-court transcript, containing findings after a proper plea colloquy, places upon petitioner a "heavy burden" to overturn the state findings. *Id.* at 328; *see Parke v. Raley*, 506 U.S. 20, 29-30 (1992). The transcript of the *nolo contendere* plea shows that the court was careful to ask appropriate questions to establish the voluntary nature of the plea. During the plea colloquy, the court asked the following question:

> THE COURT: Has anyone used any other promises or any threats of any kind to try to get you to plead *nolo contendere* or no contest?

Petitioner answered, "No, sir." (NCP, 7). After completing the plea proceedings, the court twice found that petitioner's plea was "understanding, voluntary and accurate." At no time during the proceedings did petitioner state or imply that he was acting under duress because of the court's alleged threats.

In *Blackledge v. Allison*, 431 U.S. 63 (1977), the habeas petitioner claimed that he was promised a maximum sentence of ten years by his attorney, but was actually given a sentence of 17-to-21 years. With regard to the weight that the habeas court should accord the plea proceedings in state court, the Supreme Court stated:

> For the representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge, 431 U.S. at 73-74 (citations omitted). The Supreme Court nevertheless remanded for an evidentiary hearing, because no transcript whatsoever existed of the sentencing hearing. 431 U.S. at 66-67.

In later cases, the Sixth Circuit addressed the opposite situation, in which the trial judge's careful questioning of the defendant was reflected in a transcript, and the transcript negated the defendant's later claim of involuntariness. In

Baker v. United States, 781 F.2d 85 (6th Cir. 1986), the Sixth Circuit distinguished *Blackledge*, indicating that the trial record exemplified the type of "commendable procedures" the *Blackledge* Court indicated would negate a later claim of involuntariness. 781 F.2d at 89. During the plea hearing, the trial court inquired concerning the terms of the bargain, received a response from the prosecutor on the record, and received denials from defense counsel, the prosecutor, and the defendant concerning the existence of any other terms. The Sixth Circuit, agreeing with a previous Fifth Circuit case, held that where the trial court has scrupulously followed the required procedure, "the defendant is bound by his statements in response to that court's inquiry." 781 F.2d at 90 (quoting *Moore v. Estelle*, 526 F.2d 690, 696-97 (5th Cir. 1976)). The Sixth Circuit, noting the obvious, observed that a trial judge cannot possibly administer a plea agreement "if it consists of secret terms known only to the parties." 781 F.2d at 90. Furthermore, because defendant's later claim of a secret agreement was negated by the trial record, the Sixth Circuit held that no evidentiary hearing was required under 28 U.S.C. § 2255. 781 F.2d at 92.

The Sixth Circuit again addressed this situation in *Warner v. United States*, 975 F.2d 1207 (6th Cir. 1992), and *United States v. Todaro*, 982 F.2d 1025 (6th Cir. 1993), also section 2255 cases. In *Todaro*, the defendant attempted to attack his guilty plea, claiming that his attorney had promised him that he would be sentenced to probation if he pled guilty. Defendant had stated, during the plea colloquy, that there were no other promises made to him, other than those stated in the plea agreement. 982 F.2d at 1026. Consequently, the Sixth Circuit was again faced with a situation in which a defendant's post-conviction allegations were directly contrary to his statements at the plea hearing. Relying on *Baker*, the court reiterated its earlier holding, under which a defendant is bound by his statements in response to the court's inquiry, where there has been a careful plea colloquy. On this basis, the court affirmed the district court's rejection of the section 2255 claim. 982 F.2d at 1029. Additionally, the court held that no evidentiary hearing was required, because the promise that defendant alleges "is directly refuted on the record." *Id.* The court distinguished earlier cases, in which the record did not clearly contradict the petitioner's allegations. In *Warner*, the Sixth Circuit likewise rejected claims of attorney promises in the face of the defendant's flat denial of promises at the plea, holding that petitioner's statements "estopped" him from relying on undisclosed promises.[6] 975 F.2d at 1210-11.

In the present case, the state-court transcript shows that the *nolo contendere* plea was voluntary, and it specifically negates the existence of threats. Under the foregoing authorities, I conclude that petitioner is precluded from claiming that the trial court's previous comments constituted a threat coercing his plea, because he testified otherwise under oath at the time of the plea. As noted by the Sixth Circuit, "to allow collateral attacks on guilty pleas to be based on such claims would make every plea subject to attack and render the oral responses given in court meaningless." *Warner*, 975 F.2d at 1212. Petitioner's statements during the plea hearing concerning the lack of threats preclude him from making such a claim now in habeas corpus review.

---

[6] More recently, the court in *Peavy v. United States*, 31 F.3d 1341 (6th Cir. 1994), ordered an evidentiary hearing to inquire into allegations of an undisclosed plea agreement. The *Peavy* court noted that the government admitted the existence of an oral plea agreement, not reflected during the plea hearing. 31 F.3d at 1345. The court was also careful to observe that the trial court had not directly asked the defendant whether there were any promises apart from the plea agreement. "Such inquiries would have prompted disclosure of the promises on which Peavy relies here, or, if Peavy had remained silent, likely would foreclose his post-conviction reliance on [those] promises." *Id.* (emphasis added).

Finally, even if this court were at liberty to ignore the factual determination of the state appellate and trial courts and the transcript of the plea proceedings, the record simply does not support petitioner's claim. To be sure, the comments of the trial judge were intemperate. Nevertheless, they were directed to the assistant prosecutor, not to defendant, and were made in the context of a motion hearing, not in a colloquy with defendant himself. The remarks occurred one week before the *nolo contendere* plea, and the record is clear that petitioner's counsel corresponded and spoke to him in the meantime. In counsel's written communication, he stressed the seriousness of the situation and the fact that petitioner's claim of accident was not supported by the physical evidence. At the plea hearing, defense counsel stated for the record that he had spoken to petitioner on "Friday evening" (a time after the motion hearing) and that petitioner indicated that he wanted to go through with the no-contest plea. Petitioner's subsequent answers to the court's questions demonstrated that petitioner was acting of his own free will. The present record lacks even a scintilla of evidence supporting a causal link between the court's statements a week previously and the *nolo contendere* plea. Consequently, even if this factual issue were subject to *de novo* review by this court, I would conclude that petitioner has failed to show that his plea was induced by the comments of the trial judge.

For the foregoing reasons, I recommend that petitioner's first claim for relief be rejected on its merits.

II. Insufficient Notice of the Elements of the Crime

Petitioner's second claim for habeas corpus relief is that his *nolo contendere* plea was not intelligent, because the trial judge failed to inform him during the plea colloquy of the elements of the offense of second-degree murder. In support of this proposition, petitioner principally relies upon the Supreme Court's decision in *Henderson v. Morgan*, 426 U.S. 637 (1976).

I note at the outset that this claim was not properly exhausted in the state courts. An applicant for habeas relief must exhaust remedies available in the state courts, or show that there is an absence of available corrective state processes or the existence of circumstances rendering those processes ineffective to protect the prisoner's rights. 28 U.S.C. § 2254(b)(1). In order to fulfill the exhaustion requirement, petitioner must fairly present as federal questions to all levels of the state appellate system, including the state's highest court. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Duncan v. Henry*, 513 U.S. 364 (1995); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). Petitioner bears the burden of showing exhaustion. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a "somewhat similar" state-law claim was made. *Duncan*, 513 U.S. at 366; *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *see Prather v. Rees*, 822 F.2d 1418, 1421 (6th Cir. 1987) ("A habeas petitioner must present his claims to the state court as a federal constitutional issue -- not merely as an issue arising under state law.").

In the present case, petitioner's appellate counsel challenged the adequacy of the plea colloquy only under the state court rule and cases decided thereunder. Counsel did not cite *Henderson v. Morgan* or any other federal due-process decision. In fact, the federal Constitution was never mentioned in the state appellate courts. Rather, the analysis focused on the requirements of MICH. CT. R. 6.302(B)(1), which specifically provides that "the court is not obliged to explain the elements of the offense." Likewise, Michigan common law holds that it is "unrealistic" to impose upon the trial judge the obligation to impart to a defendant the substantive law applicable to his case. *In re Guilty Plea Cases*, 235 N.W.2d 132, 139 (Mich. 1975). By contrast, petitioner's habeas corpus claim relies specifically on federal due-process principles as enunciated in *Henderson*. In this court, petitioner argues that, even though state law did not, due process required the trial judge to explain the elements of the offense of second-degree murder. This claim has never been presented to any state appellate court. Consequently, the entire petition is subject to dismissal for petitioner's failure to exhaust this habeas claim. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982).

The exhaustion doctrine, however, is subject to an important statutory exception. Under AEDPA, a district court has discretion to deny a habeas corpus claim on its merits, despite the lack of exhaustion. 28 U.S.C. § 2254(b)(2); *see Mott v. Rivers*, No. 95-2164, 1997 WL 441793, at * 1 n.1 (6th Cir. Aug. 5, 1997). This provision of AEDPA codifies previous Sixth Circuit law, which granted the district court discretion to deny a habeas claim on its merits despite the lack of exhaustion. *See Cain v. Redman*, 947 F.2d 817, 820 (6th Cir. 1991); *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1054 (6th Cir. 1983). This rule is designed to spare the state courts the useless and wasteful exercise of reviewing patently groundless constitutional claims. *Cain*, 947 F.2d at 820. Having reviewed the substance of petitioner's unexhausted due-process claim, I conclude that it is meritless. I therefore recommend that the court deny this claim on its merits, rather than burdening the state courts with post-conviction review of an insubstantial federal claim.

To be entitled to habeas corpus relief, a petitioner must show that the state-court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d). Where, as here, a federal claim has not been reviewed by the state courts, the habeas court is obliged to conduct an independent review to determine if the state court's *result* is contrary to federal law or involves an unreasonable application of clearly established law. *Harris*, 2000 WL 634994, at * 3. The review remains deferential, because the court cannot grant relief unless the state court's result is not in keeping with the strictures of AEDPA. *Id.* Consequently, in order to prevail in the present habeas case, petitioner must show that the result of the decision of the Michigan Court of Appeals is contrary to or involves an unreasonable application of clearly established federal law as enunciated by the United States Supreme Court. In applying this standard, the court must apply the definitions of these terms of art recently set forth in the Supreme Court's decision in *Williams v. Taylor*, 120 S. Ct. 1495, 1523 (2000).

At the no-contest plea hearing, the trial judge merely described the charge against petitioner as "murder in the second degree." (NCP, 3). Relying principally on the Supreme Court's decision in *Henderson v. Morgan*, 426 U.S. 637 (1976), petitioner argues that the trial judge's statement was insufficient to apprise petitioner of the nature of the charge to which he was pleading, in violation of his due-process rights. In *Henderson*, a mentally impaired defendant argued that his guilty plea to a New York charge of second-degree murder was not voluntary, because neither defense counsel nor the trial judge ever made it clear to him that intent to kill was a necessary element of second-degree murder under New York law. The Supreme Court found that intent to kill was indeed a necessary element of the offense under state law. 426 U.S. at 645. The transcript of the plea hearing was devoid of any explanation of this element, and the district judge found in an evidentiary hearing that the element of intent was never explained to the defendant. "There was no discussion of the elements of the offense of second-degree murder, no indication that the nature of the offense had ever been discussed with respondent, and no reference of any kind to the requirement of intent to cause the death of the victim." *Id.* at 642-43. For this reason, the Supreme Court found that the plea was rendered involuntary. *Id.* at 647. In so holding, the Court noted that the charge of second-degree murder "was never formally made." *Id.* at 645. The Court reasoned that had the charge been formally made, "it necessarily would have included a charge that respondent's assault was 'committed with a design to effect the death of the person killed.'" *Id.* At the conclusion of the opinion, the Court made the following comments, reflecting the narrowness of the rule enunciated in the case:

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel

> that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. *This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent.* Moreover, respondent's unusually low mental capacity provides a reasonable explanation for counsel's oversight; it also forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder.

426 U.S. at 647 (emphasis added).

Consequently, the *Henderson* decision cannot be read, as petitioner now contends, as erecting an absolute constitutional requirement that a trial court explain the elements of the offense as a prerequisite to accepting a plea of guilty or *nolo contendere*. To the contrary, the Supreme Court indicated that the Constitution would be satisfied if the charge is "formally made," or if there is a representation by defense counsel that the nature of the offense has been explained to the accused which, in most cases, can be presumed. Subsequent decisions of the Court bear out this interpretation. In *Marshal v. Lonberger*, 459 U.S. 422 (1982), the Court stated as follows: "Under *Henderson*, respondent must be presumed to have been informed, either by his lawyers or at one of the presentencing proceedings, of the charges on which he was indicted." 459 U.S. at 437. On this basis, the Court reversed the grant of habeas relief to a petitioner, despite his testimony that the attempt charge had never been explained to him by the court or his attorneys. Likewise, in *Bousley v. United States*, 523 U.S. 614 (1998), the Supreme Court cited *Henderson* for the proposition that the act of providing a criminal defendant with the indictment, standing alone, gives rise to a "presumption that the defendant was informed of the nature of the charge against him." 523 U.S. at 618.

Petitioner is therefore in error when he argues that *Henderson* creates a clearly established rule of constitutional law requiring the trial court to expressly explain the elements of an offense at a plea hearing. Rather, the due-process requirement of adequate notice of the nature of the charge may be satisfied a number of ways, including by a presumption that counsel informed the criminal defendant of the nature of the charge. In the present case, however, there is no need to rely on any such presumption. The record clearly establishes that petitioner was expressly informed of the elements of the offense of second-degree murder under Michigan law. On April 4, 1994, approximately one week before the entry of the *nolo contendere* plea, petitioner and counsel appeared before the circuit court in an effort to present such a plea. At the outset of the proceedings, the court read to petitioner the body of the information, as follows:

> The charge against you is that on the date of January 12, 1994, at 808 West Front Street, Number 25, City of Buchanan, Berrien County, Michigan, that you did with intent to kill, to do great bodily harm, or to do an act in

> wanton and willful disregard of the likelihood that the natural tendency of said act would cause death or great bodily harm, kill and murder one Shawn Michael Bagarus, B-A-G-A-R-U-S, said act committed without premeditation or deliberation, contrary to statute.
>
> Do you understand that charge?
>
> THE DEFENDANT: Yes.

(RT, 4-5). The trial court's statement was an accurate recitation of the elements of second-degree murder under Michigan law. What was known at common law as the crime of murder is now classified by Michigan statute as the crime of second-degree murder. MICH. COMP. LAWS § 750.317. The essential elements of the offense are (1) the death of the victim (2) caused by defendant (3) without justification or excuse and (4) with malice aforethought. *People v. Klave*, 343 N.W.2d 565, 568 (Mich. Ct. App. 1983). The malice requirement is a mental state of the defendant consisting of the intent to kill or to inflict great bodily harm or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *See People v. Dykhouse*, 345 N.W.2d 150, 151 (Mich. 1984); *People v. Langworthy*, 331 N.W.2d 171, 179 (Mich. 1982). True to Michigan law, the trial judge informed petitioner that he was charged with killing Shawn Michael Bagarus "with intent to kill, to do great bodily harm, or to do an act in wanton or willful disregard of the likelihood that the natural tendency of said act would cause death or great bodily harm." The fact that this advice concerning the elements of the offense was given a week before acceptance of the *nolo contendere* plea does not create a constitutional violation. As the Supreme Court has made clear, the Due Process Clause is satisfied when a defendant is informed "either by his lawyers or at one of the presentencing proceedings, of the charges on which he was indicted." *Marshal*, 459 U.S. at 437. The trial judge's reading of the criminal information to petitioner was adequate under both *Henderson* and *Marshal*. Furthermore, at the time of the *nolo contendere* plea itself, defense counsel stated on the record that he and his client "went through all the allegations and factors of this offense and we are ready to proceed." (NCP, 2-3). This representation, even absent a reading of the information by the trial court, is sufficient to satisfy *Henderson*. 426 U.S. at 647.

To bolster this plainly meritless argument, petitioner contends that, had he known the elements of second-degree murder, he would have not entered his plea, because he believed all along that the incident was the result of an accident. In support of this contention, he points to his statement at sentencing (ST, 9-10), at which he said that it was all an accident and that he never meant to hurt the child. As a threshold matter, I note that it is common for criminal defendants to try to minimize their culpability at the time of sentencing. This, standing alone, would not have been a cause of concern for the trial judge. More important, however, is the fact that petitioner's "accident" defense was well-known to the judge and attorneys at the time of the *nolo contendere* plea. As defense counsel advised petitioner in writing, on two occasions, the physical evidence was completely inconsistent with his claim of accident. The record clearly establishes that petitioner understood the nature of the murder charge against him and that his claim of accident was not likely to succeed at trial. By pleading *nolo contendere* pursuant to a sentencing agreement, petitioner avoided a possible life sentence or a longer term of years.

The record conclusively establishes that petitioner's right to notification of the nature of the charge, as enunciated by the Supreme Court in *Henderson* and subsequent cases, was satisfied. Petitioner's argument that *Henderson* and its progeny obliged the trial court to explain the elements of the offense at a plea hearing is not sustainable. Petitioner has failed in his burden to establish that the result of the state-court proceedings was contrary to, or involved an unreasonable application of, clearly established federal law. Petitioner's second habeas claim must therefore be rejected on its merits.

III. Ineffective Assistance of Counsel

The third claim for habeas corpus relief is that trial counsel was ineffective for failing to seek an evidentiary hearing to suppress petitioner's statement to Officer Dings as involuntary. Petitioner's sole ground for claiming involuntariness is his assertion that he asked to use a telephone at some point during the interrogation, and that Officer Dings said that he could use the telephone after he answered the officer's questions. In support of this contention, petitioner has provided a single page of the police report (attached as item 4 to petitioner's appendix, docket # 1).[7] Petitioner relies on a sentence in Officer Dings' report reading as follows: "After concluding my interview with Brian I allowed him to make phone calls to family and whom ever he wanted to let them know his situation." Taking advantage of the negative pregnant in this statement, petitioner contends that the officer refused to allow him to make phone calls at any time before the end of the interview. Petitioner contends that this circumstance would have led any competent counsel to seek suppression of petitioner's statement to Officer Dings, thereby depriving the prosecutor of the principal factual basis for the *nolo contendere* plea.

---

[7] Petitioner's submission of a single page of a police report is not a practice approved by this court. Documents should be submitted in their entirety, so that the court can judge their contents as a whole. As respondent did not object to the submission of the obviously incomplete and

I note at the outset that this claim, like the last one, was not presented to the state appellate courts and is therefore unexhausted. Appellate counsel did not raise this issue or any one like it. Petitioner's own *pro se* supplemental brief raised an issue of ineffective assistance of counsel for failure to "request a *Walker* hearing to determine the voluntariness, lack of coercion, and understanding nature of the defendant's alleged *Miranda* waiver." (Supplemental Brief of Appellant, at 5). The voluntariness of a *Miranda* waiver and the voluntariness of an ensuing statement are, of course, two separate issues, although they are governed by the same standard. *See Colorado v . Connelly*, 479 U.S. 157, 169-70 (1986). Petitioner's *pro se* brief focused upon the alleged involuntariness of his *Miranda* waiver, and that is the issue that the Michigan Court of Appeals resolved. The transcript of the interrogation, presented to this court by petitioner himself, reflects that petitioner was *Mirandized* both at the hospital and at the police station and that he signed a *Miranda* waiver. Apparently, petitioner's present

---

unauthenticated portion of the police report, I will nevertheless consider it as properly before the court.

counsel recognizes that no trial lawyer confronted with this evidence could be deemed ineffective for failing to seek a *Walker* hearing on the voluntariness of the *Miranda* waiver. Consequently, the issue has metamorphosized into a claim of ineffectiveness for counsel's failure to move to suppress the ensuing statement as involuntary. As with the previous claim, I find that this unexhausted claim is meritless, and therefore should be dismissed despite the lack of exhaustion in the state courts. 28 U.S.C. § 2254(b)(2).

A. Request for Evidentiary Hearing In This Court

In an effort to provide further factual support for his claim of ineffective assistance of counsel, petitioner requests an evidentiary hearing in this court. The authority of a habeas court to grant an evidentiary hearing is significantly circumscribed by AEDPA:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) the claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously

> discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Under this provision, the court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner "has failed to develop the factual basis of a claim in state court." If so, the court must then reach the question whether petitioner has established one of the two narrow exceptions set forth in section 2254(e). *See Cardwell v. Greene*, 152 F.3d 331, 336-40 (4th Cir.), *cert. denied*, 525 U.S. 1037 (1998). Upon review, I find that petitioner has failed to develop the factual basis of his claim in the state courts and that he has not established one of the two narrow exceptions set forth in the statute.

The Supreme Court has recently defined the circumstances in which a habeas petitioner is deemed to have "failed to develop" a factual basis of his claims in the state courts. In *Williams v. Taylor*, 120 S. Ct. 1479 (2000), the Court held that, "Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." 120 S. Ct. at 1488. The diligence requirement exists to preserve comity between the state and federal courts.

"Comity . . . dictates that when a prisoner alleges that his continued confinement for a state conviction violates federal law, the state court should have the first opportunity to review this claim and provide any necessary relief." 120 S. Ct. at 1490 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999)). The Court emphasized that federal courts sitting in habeas "are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.* at 1491. Significantly, to satisfy the diligence requirement, a petitioner "at a minimum [must] seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 1490.

The state courts held no evidentiary hearing on petitioner's claim of ineffective assistance of trial counsel, nor were they asked to do so. The issue was raised in petitioner's *pro se* supplemental brief, which did not contain a request for a remand for purposes of an evidentiary hearing. Although petitioner's counsel did make a motion for remand, it was for the sole purpose of allowing petitioner to withdraw his guilty plea. The motion for remand did not seek an evidentiary hearing on either the voluntariness of petitioner's confession or the question of ineffective assistance of counsel. Indeed, neither issue was ever raised by appellate counsel.

Under Michigan law, when the facts underlying a claim of ineffective assistance of counsel do not appear of record, it is incumbent upon the defendant to make a testimonial record at the trial court level to support the claim of ineffectiveness. *See People v. Ginther*, 212 N.W.2d 922, 925 (Mich. 1973); *see also People v. Hoag*, 594 N.W.2d 57, 59 (Mich. 1999). If the matter is already on appeal, the appropriate procedure is to move in the appellate court for an order of remand, to allow defendant to make a record.

Ginther, 212 N.W.2d at 925-26. A defendant's failure to establish an appropriate factual record forecloses appellate review of claims of ineffective assistance of counsel, except for facts already appearing of record. *See People v. Dixon*, 552 N.W.2d 663, 669 (Mich. Ct. App. 1996); *see also People v. Snider*, 608 N.W.2d 502, 517 (Mich. Ct. App. 2000). The Michigan Appellate Rules require that motions to remand be filed within the time provided for the filing of appellant's brief. MICH. CT. R. 7.211(C)(1)(a).

Williams v. Taylor requires, at a minimum, that a habeas petitioner first have sought "an evidentiary hearing in state court in the manner prescribed by state law." 120 S. Ct. at 1490. Here, petitioner never sought a *Ginther* hearing in the trial court, nor did he seek a remand in the Michigan Court of Appeals for purposes of a *Ginther* hearing. The request for remand by petitioner's counsel on issues unrelated to the ineffective assistance of counsel clearly does not suffice. Under *Williams v. Taylor*, petitioner must be held to have "failed to develop" the factual basis for his ineffective assistance of counsel claim in the state courts. The state courts never refused to hold a *Ginther* hearing, as neither petitioner nor his counsel ever asked for one.

Petitioner does not fall within either of the narrow exceptions created by section 2254(e)(2). First, petitioner is not claiming the benefit of any new rule of constitutional law now made retroactive on collateral review by the Supreme Court. Furthermore, petitioner is not relying on a factual predicate that could not have previously been discovered through the exercise of diligence. Petitioner himself raised the ineffective assistance of counsel for failure to seek a suppression hearing in the state court. Obviously, this ground was known to him at the time he filed his *pro se* supplemental brief. Petitioner, however, failed to ask for an evidentiary hearing on this issue. In these circumstances, petitioner is barred from an evidentiary hearing in this court by the provisions of section 2254(e)(2). Petitioner's claim of ineffective assistance of counsel must be judged on the present record.

B. Merits of Sixth Amendment Claim

Petitioner's Sixth Amendment claim suffers from fatal deficiencies. Petitioner's ability to challenge the voluntariness of his statement to police is precluded by the entry of his *nolo contendere* plea. A plea of guilty or *nolo contendere* waives most nonjurisdictional constitutional rights. *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Under this doctrine, a guilty plea waives challenges of a coerced confession. *See McMann v. Richardson*, 397 U.S. 759-69, 771 (1970). Consequently, petitioner is not allowed to mount a frontal attack in this habeas action against his statement to Officer Dings. Rather, petitioner alleges that his trial attorney was ineffective for failure to challenge the voluntariness of the confession. In order to prevail on this claim, petitioner must satisfy the two-prong test established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a petitioner must establish that counsel's performance fell below an objective standard of reasonableness and second, that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. *Strickland*, 466 U.S. at 687-88; *see Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). Both prongs of the *Strickland* test involve mixed questions of law and fact. 466 U.S. at 698. Under AEDPA's deferential standard, a federal court will not disturb a state court's application of law to facts unless the state court's conclusions involve an "unreasonable application" of clearly established federal law as determined by the Supreme Court.

With regard to the first prong of the *Strickland* standard, petitioner can prevail only by showing that counsel's decision not to challenge the voluntariness of his confession fell below an objective standard of reasonableness. In adjudicating this prong of the standard, the court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690. The court should recognize that counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* The Sixth Amendment is violated only if counsel's acts or omissions "were outside the wide range of professionally competent assistance." *Id.* Counsel does not violate the *Strickland* standard by failure to raise futile or clearly meritless motions. *See McQueen v. Scroggy*, 99 F.3d 1302, 1328 (6th Cir. 1996) ("It is not ineffective assistance to fail to raise erroneous claims.").

When a criminal defendant claims that his confession was rendered involuntary by police coercion, the court must inquire whether, considering the totality of the circumstances, the conduct of law enforcement officials overbore the will of the accused. *See Mincey v. Arizona*, 437 U.S. 385 (1978); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973). Official coercion "is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). A criminal defendant must establish that the police were guilty of objectively coercive activity, typically falling into the category of brutality or threats of physical coercion. *See, e.g., Arizona v.*

Fulminante, 499 U.S. 279 (1991). The Michigan state courts follow the same test in judging the voluntariness of a confession. *See People v. Cipriano*, 429 N.W.2d 781, 790 (Mich. 1988); *People v. Fike*, 577 N.W.2d 903, 905 (Mich. Ct. App. 1998).

Petitioner's only claim of official coercion is that Officer Dings refused to allow petitioner to use the telephone until petitioner was done answering his questions. The Michigan Court of Appeals ruled that, even if this allegation were true, it would not have invalidated the confession and that defense counsel was not ineffective in failing to request a *Walker* hearing. (Op., 2). This conclusion was certainly correct. Although present counsel attempts to characterize Officer Dings' alleged conduct as "holding petitioner incommunicado," this is obvious hyperbole. The interrogation began at 11:41 a.m. and could not have lasted for more than an hour or two. No decision of the federal or state supreme court would support a finding of involuntariness merely because a criminal suspect was not allowed to use the phone for a brief period of time.[8] The cases that petitioner cites in support of his argument are wildly inapposite. For example, *Brooks v. Florida*, 389 U.S. 413 (1967), involved a challenge to a confession in circumstances where the petitioner was confined naked in a tiny cell without toilet facilities except a hole in one corner, where he subsisted for two weeks on a daily fare of twelve ounces of thin soup and eight ounces of water. For two weeks, the petitioner saw no one from outside the prison but was completely under the control and domination of his jailers. In *Blackburn v.*

---

[8] Petitioner makes no allegation that he requested to use the phone for purposes of calling counsel.

Alabama, 361 U.S. 199 (1960), the Supreme Court invalidated a confession from a defendant who was insane and incompetent at the time of his statement and had been subjected to eight or nine hours of sustained interrogation in a tiny room.

Petitioner's attempted reliance upon state-law authority is similarly misplaced. In *People v. Summers*, 166 N.W.2d 672 (Mich. Ct. App. 1969), the Michigan Court of Appeals invalidated a confession from a twenty-two year old defendant who had not graduated from grammar school and had either been beaten or was so disoriented and in fear that it was clear he did not desire to give a statement.

In the present case, petitioner had attended some college. He was not distraught, nor did he ever ask that the questioning stop. The interrogation was not lengthy. Petitioner was obviously willing to give the officer his side of the story in an effort to avoid prosecution. The decisions of the United States Supreme Court that have invalidated confessions because the police held the suspect incommunicado bear no resemblance to the present case. For example, in *Darwin v. Connecticut*, 391 U.S. 346 (1968), officers arrested and questioned a suspect for an entire day, unsuccessfully attempting at the end of the first day to hypnotize him. He was questioned the entire next day and confessed only after fainting. During this entire period, counsel tried unsuccessfully to contact the suspect, calling the police at least nineteen times and visiting the police station five times. Officers nevertheless held the suspect incommunicado for 30 to 48 hours, even ignoring a state court's writ of habeas corpus during this period. The Court held that these circumstances rendered the confession involuntary. Similarly, in *Haynes v. Washington*, 373 U.S. 503 (1963), the suspect asked several times to call his attorney and wife during a sixteen-hour period of interrogation. Officers uniformly refused his requests and told him he would be allowed to use the telephone only after he confessed to his involvement in the crime. Petitioner was not allowed to phone anyone on the night after his arrest or the next day, and was held incommunicado for five to seven days thereafter. Again, this fact pattern does not remotely resemble the one in the present case, where petitioner was interrogated for a brief period of time and the only allegation of coercion arises from his single request to call his family.

In these circumstances, petitioner meets neither prong of the *Strickland* test. First, defense counsel was not objectively unreasonable in failing to seek to suppress petitioner's statement. The taped confession bore no indicia of coercive police tactics. The mere fact that petitioner was allegedly denied the ability to use the telephone for a brief period would not have rendered his confession involuntary. Counsel did not act unreasonably by failing to move for suppression. On similar grounds, petitioner cannot meet the prejudice prong of the *Strickland* standard. In order to meet this prong, petitioner must show that the outcome of the case was rendered unreliable by the alleged attorney error. *Lockhart*, 506 U.S. at 369. Even had trial counsel made a motion to suppress in the present case, the motion would clearly have been unsuccessful. Consequently, petitioner would have found himself in the same position after an unsuccessful *Walker* motion as he faced on the eve of trial, when he decided to plead *nolo contendere.* Petitioner suffered no prejudice from the failure of counsel to seek to suppress petitioner's confession.

For the foregoing reasons, I recommend that petitioner's third claim for habeas corpus relief be denied on its merits.

Recommended Disposition

For the foregoing reasons, I recommend that petitioner's habeas corpus petition be denied on its merits.

Dated: July 5, 2000

Joseph G. Scoville
United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within ten days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by WD MICH LCIVR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Neuman v. Rivers*, 125 F.3d 315, 322-23 (6th Cir. 1997); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Order

Michigan Supreme Court
Lansing. Michigan

Entered: August 30, 1996

105322

Conrad L. Mallett, Jr.
Chief Justice
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,
v
BRIAN GARCIA,

Defendant-Appellant.

SC: 105322
COA: 175911
LC: 94-000220

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certifiy that the foregoing is a true and complete copy of the order entered at the direction of Court.

August 30, 1996 /s/ Corbin R. Davis

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 1995 No. 175911 LC No. 94-000220

v.

BRIAN GARCIA,
Defendant-Appellant.

Before: O'Connell, P.J., and Bandstra and J.M. Batzer,*JJ.

PER CURIAM.

Defendant pleaded nolo contendere to second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to twenty to fifty years imprisonment. Defendant now appeals as of right, and we affirm.

Defendant first argues that the trial court improperly accepted defendant's nolo contendere plea. We disagree. MCR 6.302(A) states that the court may not accept a plea of nolo contendere unless it is convinced that the plea is understanding,.voluntary, and accurate. Our review of the record shows that defendant's plea was understanding, voluntary, and accurate. The trial court strictly followed MCR 6.302 to ensure that defendant's plea was understandingly, voluntarily, and accurately given. Defendant concedes that the trial judge named the offense to which he was pleading, but defendant asserts that the trial court failed to inform him of the nature of the charge. This argument is without merit. MCR 6.302(B)(1) specifically states that the court is not obliged to explain the elements of the offense.. . ." Furthermore, in Guilty Plea Cases, 395 Mich 96, 116; 235 NW2d 132 (1975), our Supreme Court stated that "it would be unrealistic to impose on the judge the obligation to impart to a defendant the substantive law applicable to his case.

Defendant argues that the trial court should have gone further in explaining defrndant's rights, such as compulsory process, the right to present defense witnesses and to have the court provide for service of process and payment of the process fees for the witnesses, and the tirght to remain silenet and not have his silence used against him. However, the trial court strictly, complied with MCR 6.302 regarding these issues. The trial court informed defendant of his constitutional and other rights, and defendant stated on the record that he understood the effects of his nolo contendere plea. See Guilty Plea Cases, supra, at 122-124. Thus, these arguments are without merit.

Defendant also argues that, pursuant to MCR 6.302(D)(2), the trial court failed to establish support for its finding that defendant was guilty of second-degree murder. We disagree. At the plea hearing, defendant, defense counsel, and the prosecutor agreed that the trial judge could consider the autopsy report and the preliminary examination transcript in lieu of testimony for the purpose of accepting defendant's nob contendere plea. As correctly stated by the trial judge, the autopsy report and the preliminary examination transcript established support for a finding that defendant was guilty of the offense to which he was pleading nolo contendere. MCR 6.302(D)(2)(b). The autopsy stated that the eight-month-old victim had multiple cranial fractures and died as a result of 'blunt force trauma" to the head. At the preliminary hearing. Police Officer Dings testified that defendant told him that he had struck the victim's head against the floor twenty to thirty times after the victim would not stop crying. This evidence was sufficient to establish that defendant was guilty of second-degree murder, i.e., that defendant intended to do great bodily harm to the victim, or that he acted with willful and wanton disregard of the likelihood that the natural tendency of his actions would be to cause death or great bodily harm. People v. Biggs, 202 Mich App 450, 453; 509 NW2d 803 (1993).

Next, defendant argues that the trial court abused its discretion in imposing sentence upon defendant. We disagree. Pursuant to a plea bargain, it was agreed that defendant would be sentenced within the bottom two-thirds of the sentencing guidelines' range in exchange for defendant's nolo contendere plea to second-degree murder. The sentencing guidelines range called for a minimum sentence of ten to twenty-five years or life in prison. The court thereafter followed the plea agreement and imposed a minimum sentence of twenty years' imprisonment. Albeit at the upper end of the plea agreement, this sentence fell within the range as stipulated to by the parties in the plea agreement. Although defendant now asserts that the twenty year minimum term was miscalculated in that two-thirds of the minimum guidelines' range is ten years to 16 years 8 months (i.e., two-thirds of 2.5 years equals 16 years 8 months), this is incorrect. Sixteen years 8 months would only be correct if the sentencing guidelines' range was zero to 25 years rather than ten to 25 years.

Moreover, the lower court record clearly shows that the parties understood that in order to stay within the terms of the plea bargain. defendant's minimum sentence would tall within ten to twenty years imprisonment. Thus, defendant was sentenced in accordance with the plea bargain.

Furthermore, defendant's sentence does not violate the principle of proportionality set forth in People v. Milbourn, 435 Mich 630; 461 NW2d 1 (1990). Defendant's sentence is within the minimum guidelines' range and is therefore presumptively proportionate. People v. Broden, 428 Mich 343, 354-355; 408 NW2d 789 (1987). We have reviewed defendant's arguments and conclude that defendant has failed to present any unusual circumstances to overcome the presumption of proportionality. Therefore, defendant's sentence is proportionate. Milbourn, supra. Accordingly, the trial court did not abuse its discretion in imposing this sentence. *Id.* at 636; People v Poppa, 193 Mich App 184, 187; 483 NW2d 667 (1992).

Defendant also argues that he was denied effective assistance of counsel. Defendant first claims that defense counsel was ineffective for failing to request a Walker [1] hearing. Assuming arguendo that Police Officer Dings told defendant that he could use the phone to call his family after he "answer[ed the officer's] questions," we do not believe that this alleged statement by Dings equates to a promise of leniency that reasonably induced defendant to confess. See People v Butler, 193 Micb App 63, 69; 483 Nw2d 430 (1992). There was no claim that defendant had to confess in order to use the phone to call his family. Therefore, defense counsel was not ineffective in failing to request a Walker hearing.

Defendant further asserts that he was denied effective assistance of counsel in making his plea. We disagree. When reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, our Court must determine whether the defendant's plea was made voluntarily and understandingly. People v Bordash, 208 Mich App 1, 2; 527 NW2d 17 (1994); In re Oakland Co Prosecutor, 191 Mich App 113,120; 477 NW2d 455 (1991). The question is not whether, in retrospect, counsel's advice was right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases. Oakland Co Prosecutor, supra at 122.' As stated above, after having reviewed the record, we are persuaded that defendant's nolo contendere plea was knowing and voluntary. The trial court complied with MCR 6.302, and defendant stated that be understood the effects of his plea. Sufficient evidence existed to support a finding that defendant was guilty of the offense to which he was pleading nolo contendere, specifically, that be had acted with willful and wanton disregard of the dangerous consequences his actions caused for the victim. Defendant's claim that he was induced into his plea by a false promise that he would only have to serve eight years is belied by the attachments to his brief that show the eight year prediction was termed an educated guess" by his attorney as to what "should" be the result of the plea, but only "if" a ten year minimum was imposed. Similarly, the attachments show defendant's trial counsel questioned him about his medications and counseled him about the unavailability of a manslaughter bargain, contrary to arguments on appeal. Defendant's assertion that he was denied ineffective assistance of counsel in making his plea is without merit.

Next, defendant argues that he was coerced into pleading nolo contendere. The record does not support defendant's assertion. Although defendant states that the trial judge made comments in order to persuade defendant to enter a plea, we do not find this to be the case. While defendant is correct that the trial judge made several comments at a motion hearing, the comments were made in the context of whether to admit certain evidence at trial and whether additional security would be needed in the courtroom because of a threat made against defendant's life by one of the victim's relatives. Contrary to defendant's assertion, at no time did the trial judge threaten defendant or reveal any bias against defendant. Thus, the cases on which defendant relies are inapplicable in this case. As to defendant's assertions that his attorney coerced him into pleading nolo contendere, the record does not support defendant's argument.

In addition, defendant argues that his equal protection rights were violated. Defendant reasserts that his attorney and the trial judge coerced him and that his attorney was ineffective in representing him. We have already addressed these arguments, and, as previously stated, these arguments are without merit. Thus, defendant's equal protection argument must fail.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ James M. Batzer

---

[1] People v Walker (On Rehearing). 374 Mich 331; 132 NW2d 87(1965).